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No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX – VOLUME I

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PETITION FOR CERTIORARI FILED SEPT. 23, 2005
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (PORTLAND)

No. 3:00-cv-01693-PA

Confederated Tribes of Siletz Indians of Oregon et al.,

Plaintiffs,

v.

Weyerhaeuser Company,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRY
12/08/00	COMPLAINT against Weyerhaeuser Company.
10/31/02	MOTION FOR SUMMARY JUDGMENT, filed by Weyerhaeuser Company.
10/31/02	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, filed by Weyerhaeuser Company.
11/12/02	MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, filed by all Plaintiffs.
11/25/02	REPLY TO MOTION FOR SUMMARY JUDGMENT, filed by Weyerhaeuser Company.
02/14/03	PROPOSED JURY INSTRUCTIONS, filed by all Plaintiffs.
02/14/03	PROPOSED VERDICT FORM, filed by Weyerhaeuser Company.

DATE	DOCKET ENTRY
02/14/03	REQUESTED JURY INSTRUCTIONS, filed by Weyerhaeuser Company.
02/27/03	FOURTH AMENDED COMPLAINT, filed by Confederated Tribes of Siletz Indians of Oregon, Ross-Simmons Hardwood Lumber Company, Inc., Smokey Point Hardwoods Inc. against Weyerhaeuser Company.
03/10/03	ANSWER TO FOURTH AMENDED COMPLAINT, filed by Weyerhaeuser Company.
04/01/03	ORDER granting Plaintiff Smokey Point Hardwoods' MOTION TO DISMISS WITH PREJUDICE its claims against Defendant Weyerhaeuser Company.
04/17/03	MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW (DAMAGES), filed by Weyerhaeuser Company.
04/17/03	MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW (LIABILITY), filed by Weyerhaeuser Company.
04/17/03	SUPPLEMENTAL REQUESTED JURY INSTRUCTIONS, filed by Weyerhaeuser Company.
04/18/03	DRAFT JURY VERDICT FORM
04/18/03	FIRST DRAFT OF JURY INSTRUCTIONS
04/18/03	VERDICT for Plaintiff.

DATE	DOCKET ENTRY
04/21/03	COURT'S INSTRUCTIONS TO THE JURY
04/21/03	FINAL DRAFT OF THE VERDICT
04/22/03	JUDGMENT entered for Plaintiff Ross-Simmons Hardwood against Weyerhaeuser in the amount of $78,769,218.00 & for Weyerhaeuser against Plaintiffs Confederated Tribes of Siletz & STEDCO/Ross-Simmons Joint Venture.
05/02/03	RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR NEW TRIAL, filed by Weyerhaeuser Company.
05/02/03	MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL, filed by Weyerhaeuser Company.
05/14/03	MEMORANDUM IN OPPOSITION TO DEFENDANTS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL, filed by all plaintiffs.
05/23/03	REPLY TO RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL, filed by Weyerhaeuser Company.

DATE	DOCKET ENTRY
07/07/03	OPINION & ORDER denying Defendant's RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW & ALTERNATIVE MOTION FOR A NEW TRIAL.
07/31/03	NOTICE OF APPEAL, filed by Weyerhaeuser Company.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 03-35669, 03-35984[1]

Weyerhaeuser Company,

Defendant-Appellant,

v.

Ross-Simmons Hardwood Lumber Co.,

Plaintiff-Appellee.

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRY
12/06/04	ARGUED AND SUBMITTED
05/31/05	OPINION affirming the judgment below. Judgment entered.
07/08/05	ORDER denying appellant's petition for rehearing and petition for rehearing en banc.
07/27/05	ORDER granting appellant's motion to stay the mandate pending application for a writ of certiorari.

[1] The relevant docket entries for both appeals are the same.

[Defendant's Memorandum in Support of Motion for Summary Judgment (Oct. 31, 2002)]

* * *

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[P. 1] I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs, Confederated Tribes of Siletz Indians of Oregon, Smokey Point Hardwoods, Inc., and Ross Simmons Hardwood Lumber Co. (collectively "Plaintiffs"), are the former owners and operators of three Pacific Northwest hardwood sawmills that went out of business between 1998 and 2001.[1] Plaintiffs' sawmills primarily cut alder, which is a type of hardwood species that grows in the Pacific Northwest. The Defendant, Weyerhaeuser Company ("Weyerhaeuser"), is a diversified forest-products company. Through its Northwest Hardwoods Division, Weyerhaeuser operates hardwood sawmills throughout the United States and Canada, manufacturing hardwood lumber that it sells throughout the world. Weyerhaeuser's hardwood sawmills in the Pacific Northwest primarily cut alder, which is the most available hardwood species in the Pacific Northwest.

In this lawsuit, brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, Plaintiffs allege that Weyerhaeuser forced

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[1] Ross-Simmons Hardwood Lumber Company ("Ross Simmons") operated a sawmill in Longview, Washington. Confederated Tribes of Siletz Indians of Oregon (the "Siletz Tribe") and Ross-Simmons each owned an interest in a sawmill located in Toledo, Oregon, which was operated by Ross-Simmons in a joint venture with the Siletz Tribe. Smokey Point Hardwoods, Inc. ("Smokey Point") operated a sawmill in Arlington, Washington.

Plaintiffs out of business by monopolizing and attempting to monopolize: (1) the "submarket" for alder lumber, which Plaintiffs, Weyerhaeuser, and others manufactured and sold; and (2) the market for alder sawlogs, which Plaintiffs, Weyerhaeuser, and others purchased and used as the primary input in the manufacture of alder lumber. Plaintiffs assert that Weyerhaeuser engaged in anticompetitive conduct to drive up the price of alder sawlogs, resulting in an increase in both Plaintiffs' and Weyerhaeuser's manufacturing costs. Plaintiffs contend that because they could not economically operate at a higher level of manufacturing cost, they were in effect "forced" out of business by Weyerhaeuser. Weyerhaeuser contends that it simply operated its mills with greater efficiency and profitability.

[P. 2] Both Plaintiffs and Defendant have taken numerous depositions and have exchanged tens of thousands of pages of documents. There are several areas of factual dispute, including whether Weyerhaeuser's business decisions were made for legitimate and valid business reasons and whether Plaintiffs' business failures were the result of anything other than Plaintiffs' own poor management, outdated technology, and use of business assets and revenues for the personal, rather than business, purposes of Plaintiffs' management. Such factual disputes, of course, cannot be resolved by summary judgment. There are, however, other dispositive issues in this case that can and should resolve Plaintiffs' claims. As to these issues there is no genuine factual issue and the resolution of these issues involves only the application of settled law to undisputed facts.

As more fully discussed below, under Section 2 of the Sherman Act, a plaintiff must show: (1) that the defendant possesses monopoly power in a properly defined relevant market; (2) that the defendant obtained or maintained through predatory conduct; and (3) that causes antitrust injury to the plaintiff. With regard to the first element of Plaintiffs' antitrust claim, namely the possession of monopoly power in a

properly defined relevant market, Weyerhaeuser will show that Plaintiffs' two alternative proposed relevant markets (a "submarket" for alder lumber and a market for alder sawlogs) are legally and economically unsupportable.

Weyerhaeuser will show that the only market definition in the context of this case that can satisfy the requirements set forth in binding and authoritative Ninth Circuit precedent (i.e. the only properly defined "relevant market" under Section 2) is the market for hardwood lumber. In this market, it is undisputed that Weyerhaeuser, with a market share of less than three percent, does not possess monopoly power. In addition, and as an independent and alternative argument, it will be shown that there are no significant barriers to entry into Plaintiffs' alleged market for alder lumber. Thus, even under Plaintiffs' own market definition, Weyerhaeuser does not possess monopoly power because binding and authoritative precedent holds that there cannot be market power in the absence of significant barriers to entry. Weyerhaeuser will further show that it does not make either economic or logical sense to view sawlogs, which is an input in the manufacture [P. 3] of lumber, as the relevant market in a monopolization case brought by several manufacturers of lumber against a competing manufacturer of lumber.

With regard to the second element of Plaintiffs' antitrust claim, namely the acquisition or maintenance of monopoly power through predatory conduct, the only conduct to which Plaintiffs can point (and in which Plaintiffs can create a genuine factual issue) is the allegation that Weyerhaeuser engaged in a strategy designed to raise its rivals' costs. Plaintiffs' other allegations are immaterial because of a complete and obvious absence of any causal antitrust injury to Plaintiffs. Although Weyerhaeuser denies engaging in a strategy to raise its rivals' costs, it recognizes that under the standard applicable to summary judgment, Plaintiffs' disputed evidence is likely sufficient to at least raise a factual

issue on that matter. Accordingly, that will not be the basis of Weyerhaeuser's motion regarding this second element.

Instead, Weyerhaeuser will show that, as a matter of law, the claim of "raising rivals' costs," at least in the form that Plaintiffs present in this case, has never been accepted by any court as the basis for the predatory conduct element of a Section 2 claim, especially in the absence of proof that such conduct caused the defendant to operate at a loss or that such conduct raised the costs of the defendant's rivals disproportionately greater than it raised the defendant's own costs. Because the undisputed evidence is that Weyerhaeuser did not sell alder lumber below its costs, Weyerhaeuser did not engage in predatory conduct even if Plaintiffs' factual allegations are accepted as true. In other words, even if predatory pricing (i.e. below-cost pricing) may be considered to be predatory conduct in violation of Section 2, merely reducing one's profit margins to gain a competitive advantage while still selling at a profitable level can never be predatory conduct as a matter of law. It is merely competition. It may be hard competition, but it is lawful competition nonetheless.

Specifically, Weyerhaeuser will demonstrate that:

A. Plaintiffs fail properly to define the relevant market under Section 2 of the Sherman Act. Although Plaintiffs allege a submarket of alder lumber, they fail to present any [P. 4] "economically significant" evidence sufficient to support such a submarket under established legal precedent. Moreover, the undisputed economic evidence shows that the only properly defined relevant market is the market for hardwood lumber. In that market, Weyerhaeuser's market share of less than three percent is too small as a matter of law to support a claim of monopoly power.

B. Plaintiffs fail to establish that the market for alder sawlogs, which is an input used in the manufacture of alder lumber, is the "relevant market" under Section 2. Although Defendant's buying practices with regard to alder sawlogs

may be relevant to Plaintiffs' claim of predatory conduct, it is economically illogical and legally unsupportable to consider alder sawlogs as the relevant market for purposes of Plaintiffs' claim under the facts presented in this case.

C. Even under Plaintiffs' own market definitions, Plaintiffs cannot show that significant barriers to entry exist to prevent new entrants into the market in response to either rising prices for alder lumber or falling prices for alder sawlogs. Under established legal precedent, there can be no market power in the absence of significant barriers to entry.

D. Plaintiffs fail as a matter of law to establish unlawful, predatory conduct. Plaintiffs' theory of "raising rivals' costs" has received a great deal of criticism in the academic economic literature and no meaningful support in the federal case law. It simply is not a legally accepted theory of predatory conduct based on the facts alleged in this case.

II. ANTITRUST LAW

A. Summary Judgment Standard In Antitrust Cases

Summary judgment is properly regarded not as a procedural shortcut, but rather as an "integral part" of the Federal Rules. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. This principle stands with equal force in antitrust cases. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); see also *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 853 n.6 (9th

* * *

[P. 25] *54 (using the input tobacco market as the relevant market in monopsony case brought by growers of tobacco).

In this litigation, however, competitors of Weyerhaeuser in the output market (i.e. competing hardwood or alder sawmills) have brought a monopolization claim asserting that an alternative relevant market is the *input* market for alder logs. Plaintiffs contend that, because Weyerhaeuser purchases a large percentage of the alder logs consumed annually in the Pacific Northwest, Weyerhaeuser has "market power" in the market for alder logs. The fact that Plaintiffs are purchasers of logs, rather than sellers of logs, however, belies their assertion of alder logs as the relevant market in this case. Similarly, Plaintiffs allege that Weyerhaeuser has paid "too much" for alder logs, not too little. Under economic principle, claims of monopsony allege that the putative monopsonist has driven down the price of the products it purchases, not driven them up.

Unlike the typical claim for monopsonization (where the relevant market would be the input market), Plaintiffs here allege that the defendant created above-market prices in the log market. But, the monopsonist's intention is just the opposite: it wants to keep the prices below the competitive level, and that is precisely why the sellers of the input bring claims alleging the unlawfulness of such conduct. *See DeLoach*, 2001 U.S. Dist. Lexis 16909 at *25 (describing monopsony power as "the ability of buyers to lower input prices below competitive levels, which requires the ability to restrict the quantity demanded of the input"). By alleging that the relevant market in this case is the market for alder logs, the Plaintiffs have gotten both the law and the economics backwards. Although alder logs may be a *market* in which Plaintiffs and [P. 26] Weyerhaeuser both participant in as input purchasers in the production of hardwood lumber, it is not the relevant market under Section 2 in the context of this litigation.[12] Therefore, the *relevant market* can only be

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[12] Plaintiffs may attempt to rely on *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), rev'd on other

the market for lumber, which is the market in which both Plaintiffs and Weyerhacuser competed for sales.

C. Weyerhaeuser Does Not Possess Monopoly Power For The Additional Reason That There Are No Significant Barriers To Entry

In addition, Plaintiffs' monopolization claim fails because Plaintiffs have not shown (or even alleged) that there are significant barriers to entry, which is a requirement under the law for a finding of market power. A plaintiff must show both that unnatural constraints prevent new competitors from entering the relevant market and also that existing competitors lack the capacity to expand their output to challenge the defendant's high prices. *See Rebel Oil*, 51 F.3d at 1439.[13]

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grounds, 389 U.S. 384 (1967), to support their assertion that the alder log market is the relevant market under Section 2. The facts and holding in Case-Swayne are, however, completely different than the case before this Court. In *Case-Swayne*, the plaintiff, a manufacturer of fruit juices, brought a monopoly action against a consortium of orange growers. Thus, the output manufacturer (Case-Swayne) brought an action against the input producer (the consortium of Sunkist growers) for controlling the market of "product oranges" grown by the Sunkist growers. This case would only be analogous if Plaintiffs were consumers (i.e. purchasers) of Weyerhaeuser's product. Such is not the case here.

[13] A showing of barriers to entry is essential because the harm to be avoided is that of the monopolist charging above-market prices for the production output. If the monopolist can force competitors out of the market through predatory conduct and can keep other new entrants from entering the market, it will be free to charge supracompetitive prices (*i.e.* above-market prices) for some significant period of time. On the other had, "with easy entry, a predator charging supracompetitive prices will quickly lose market share (as well as any chance of reaping monopoly profits) as new rivals enter the market and undercut its high price." *Rebel Oil*, 51 F.3d at 1439; *see also Matsushita*, 475 U.S. at 590 n.15 (stating that "without barriers to entry it would presumably be impossible

[P. 27] Because no such barriers to entry exist in the market (or have even been alleged by Plaintiffs)—even using Plaintiffs' own market definition—Plaintiffs' claims should be dismissed.

Entry barriers are either "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Western Parcel Exp. v. United Parcel Service of America*, 190 F.3d 974, 975 (9th Cir. 1999) (internal quotation marks omitted). Courts have recognized the following types of potential barriers to entry: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and (5) in some circumstances, economies of scale. *See Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 n.4 (9th Cir. 1993). Barriers to entry must be "significant," meaning, "capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting," in order to warrant judicial intervention. *Rebel Oil*, 51 F.3d at 1439 (emphasis added).

Plaintiffs have not alleged, much less shown, any barriers to entry so as to establish that Weyerhaeuser has market power under Section 2. First, there is no legal support for the argument that the cost of building an alder mill (or converting a softwood mill) is a barrier to entry. "The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds

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to maintain supracompetitive prices for an extended time"). Therefore, if no barriers to entry exist, there is no reason for the antitrust laws to intervene in the marketplace, even if it can be proven that the monopolist drove competitors from the market through predatory conduct.

than would an established firm." II Phillip Areeda, *et al. Antitrust Law*, 409e, at 303 (quoted in *Los Angeles Land*, 6 F.3d at 1428). *In Los Angeles Land*, the Ninth Circuit determined that plaintiff failed to show barriers to entry because there was no evidence demonstrating financing difficulties for potential competitors that were not also faced by existing firms. *Los Angeles Land*, 6 F.3d at 1428. Therefore, even if it is true that a new entrant into the production of hardwood lumber would have to seek financing to build a mill, this argument would fail to show a barrier to entry in the absence of any evidence indicating that "those willing to [P. 28] finance [hardwood lumber mills] impose[] higher financing costs on new entrants than on established firms."[14] *Id.*

Second, Weyerhaeuser does not control an essential or superior resource sufficient to constitute a barrier to entry. In support of the predatory conduct prong of their Section 2 claim, Plaintiffs allege that Weyerhaeuser entered into exclusive log supply contracts, required purchasers of its timberlands to give Weyerhaeuser the right of first refusal on any harvested alder, and owned large amounts of timberlands. (Third Amended Complaint, at 25 (Tab 1).) Those allega-

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[14] In their complaint, Plaintiffs allege that Weyerhaeuser's acquisition of other hardwood mills in the Pacific Northwest was predatory under Section 2. (Third Amended Complaint, at ¶ 25(a) (Tab 1).) Acquisition of competitors, however, is not a violation of the antitrust law in the absence of significant barriers to entry. *See United States v. Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1989) ("If there are no significant barriers to entry, . . . eliminating competitors will not enable the survivors to reap a monopoly profit [because] any attempt to raise the prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods or personal services for less. . . . Given this reality, it would be perverse to expect rivals engaged in head on competition to act like best friends; indeed, it would be cause for suspicion if they did.) (citing III Phillip Areeda, *et al.*, *Antitrust Law*, ¶ 608e, at 20-21 (1978)).

tions are appropriately analyzed under the law of exclusive contracts, which prohibits contractual arrangements "whose probable effect is to foreclose competition in a substantial share of the line of commerce affected." *Omega Evntl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (internal quotation marks omitted); *see also Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1382-83 (11th Cir. 1997) (determining that fifteen percent foreclosure was insufficient); see also 11 Areeda, supra, 1821c at 160 (stating that foreclosure percentages of less than twenty percent is harmless to competition; citing additional authority).

Plaintiffs have failed to prove that Weyerhaeuser foreclosed competition in the purchase of alder logs. At the outset, it is important to note that only control over the *stock supply* of standing timber, not the *flow supply* (harvested timber), is relevant to the analysis. (Pozdena Rpt. at 16 (Tab 21).) As Dr. Pozdena concluded, Weyerhaeuser's owns no more than 7.1 percent of the estimated standing alder timber from all timberlands in the Pacific Northwest. (*Id.*) Even [P. 29] when the alleged exclusive contracts and deed restrictions are considered, Weyerhaeuser's access to alder is "incontrovertibly too small to confer the market power alleged by Plaintiffs." (*Id.*) Thus, as a matter of law, Weyerhaeuser does not control an existing resource sufficient to create a barrier of entry to new entrants.

In short, Plaintiffs have produced no evidence whatsoever to demonstrate an essential element of their claim: that there are barriers to entry in the relevant market. Accordingly, summary judgment is proper. *See Western Parcel*, 190 F.3d at 975 (affirming summary judgment for defendant where plaintiff failed to present sufficient evidence of exclusive dealing to support contention that there were barriers to entry); *cf. American Professional*, 108 F.3d at 1154 (affirming judgment as a matter of law for defendant where plaintiff failed to establish barriers to entry).

D. Weyerhaeuser Did Not Engage In Unlawful Predatory Conduct

Plaintiffs' evidence is also insufficient to prove unlawful predatory conduct. Plaintiffs allege three types of predatory conduct. First, Plaintiffs contend that Weyerhaeuser, without regard to its own requirements or costs, bid up the price of alder logs with the intent of driving competitors from the market. (Third Amended Complaint 25(g), (h), and (i) (Tab 1).) Second, Plaintiffs assert that Weyerhaeuser, through contracts or acquisition, and again without regard to its own requirements, locked up a portion of the available supply of alder logs so that Plaintiffs could not acquire logs at a reasonable price. (*Id.* at 25(a), (c), (d), (e), (f), and (m).) Third, Plaintiffs allege that Weyerhaeuser increased its own production levels so that Plaintiffs were deprived of the additional logs being used by Weyerhaeuser. (*Id.* at 25(b) and 26(c).)

Essentially, these allegations all assert that Weyerhaeuser increased its own costs for the purpose of also raising its rivals' costs, with the intent to inflict economic harm on its rivals. Moreover, Plaintiff Ross-Simmons alleges that Weyerhaeuser sustained these higher costs over an approximate 20-year period in order to run Ross-Simmons out of business. (Nelson Rpt. at 4 [P. 30] (Tab 12).) Based on these activities, Plaintiffs allege that they were forced out of business because they could not afford to pay the same log prices that Weyerhaeuser was paying.

The problem with Plaintiffs' argument is that it does not rest upon any accepted theory of predation in the Ninth Circuit. Plaintiffs' predation theory—called "raising rivals' costs"—never been accepted in the federal courts, at least not in the form presented by Plaintiffs. Furthermore, the academics who developed this theory almost two decades ago have expressed their own doubts about its application in factual situations similar to the present case. Finally, Plaintiffs cannot establish (and do not even try to establish) that Wey-

erhaeuser has engaged in below-cost pricing, which Plaintiffs would have to show in order for their theory to even have a chance of being legally and economically plausible.

1. Plaintiffs Do Not Rely On A Legally Accepted Theory Of Predation

In support of their predation argument, Plaintiffs rely on a theory called "raising rivals' costs." This theory has its origins in a law review article published in 1986. *See* Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986). Although the theory has received considerable attention (and criticism) in scholarly journals, it has not received general acceptance in the federal courts. *See* E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Implications*, at 6.04[G] (3rd ed. 1998) (stating that the theory of raising rivals' costs has received "considerable attention from commentators, but scant attention from the courts").

The basic idea of the theory is that a company might choose to transact with input suppliers in such a way that the input costs of that company's actual or possible competitors are increased. This can be accomplished in numerous ways. For example, through a method called "real foreclosure," a company could acquire an "exclusionary right" over a significant portion of the supply, withhold that portion from its rivals, and, thus, drive up the price for the remainder of the input. Krattenmaker, 96 Yale L. J. at 236-38. Alternatively, through a method called "bottleneck," a company could obtain exclusionary rights from all of the lowest-cost suppliers of [P. 31] an input, leaving the company's competitors to compete for input from the higher-cost producers. *Id.* at 96 Yale L. J. at 234-36.

Krattenmaker's and Salop's ideas have been widely discussed and criticized in scholarly journals. See, e.g., Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*,

76 Georgetown L. J. 305, 314 (1987) (arguing that the authors' "work . . . does not contain a single example that would support a confident conclusion that firms raised rivals' costs in a way that permitted them to increase their own prices and profits"). One of the primary criticisms of the theory is that it tends to understate the costs of exclusion to the alleged predator and thereby exaggerate the profitability of the strategy. *See* Malcolm B. Coate & Andrew N. Kleit, *Exclusion, Collusion, or Confusion?: The Underpinnings of Raising Rivals' Costs*, 16 Res. L. & Econ. 73, 76-77 (1994) (Tab 13). Other commentators have remarked that the theory does not fully take into account counterstrategies available to the predators' competitors. See Donald J. Boudreaux, *Turning Back the Antitrust Clock: Nonprice Predation in Theory and Practice*, 13 Regulation 45, 49 & 52 (1990) ("Until they offer a plausible explanation of how predatory firms can raise rival's costs or otherwise disadvantage efficient rivals in the real world, predation theorists have not made an adequate case for government intervention.") (Tab 14).

The federal courts have given Krattenmaker and Salop's theory almost no attention in light of its departure from established precedent and lack of support from the antitrust economic community. Courts that have considered the theory of raising rivals' costs have criticized it for focusing on the effect on specific competitors rather than on the effect on competition generally. *See, e.g., Viacom Int'l Inc. v. Tele-Communications, Inc.*, 1994-2 Trade Cas. (CCH) 70,809 (S.D.N.Y. 1994) (noting that "Viacom is not able to cite to any court that has held a defendant liable, or has held that a defendant could be liable, simply for raising its rival's costs"); *see also Oahu Gas*, 838 F.2d at 370 ("The goal of the antitrust laws, . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."). The theory has been cited only once in the Ninth Circuit. In that case, [P. 32] *Forsyth v. Humana, Inc.*, the Ninth Circuit did

not rely on the theory of raising rivals' costs in the same way that Plaintiffs here present their claim. Here, Plaintiffs content that Weyerhaeuser paid more for its own sawlogs in order to increase Plaintiffs' costs for sawlogs as well. 114 F.3d 1467, 1478 (9th Cir. 1997). In *Forsyth*, the defendant did not increase its own costs at all when it allegedly raised the plaintiff's costs.

Plaintiffs cannot even meet the heightened burden set out in Krattenmaker and Salop's theory itself. Krattenmaker and Salop, though they depart significantly from traditional theory, nonetheless impose a "large burden" on plaintiffs. They write:

[Plaintiffs] should be required to show that the Overbuying was significantly in excess of what the defendant reasonably needed or, perhaps, that the input purchases were so large that significantly inefficient resource use would occur. This latter approach would require proof that, as a result of the inefficient resource use from Overbuying, the purchasing firm's marginal cost is, in effect, driven up to a level above the price it receives for its output. This burden would generally be very difficult for the plaintiff to carry; it is equivalent to the Areeda-Turner test for predatory pricing, as applied to input purchases.

Krattenmaker and Salop, 96 Yale L. J. at 282 n.228. Thus, even under the theory of raising rivals' costs, Plaintiffs would have to show that Weyerhaeuser priced its products below its cost. See *infra* subsection 2. Because no evidence exists to support such an argument, Plaintiffs claims fail as a matter of law.

2. Plaintiffs Do Not Allege And Cannot Prove Predatory Pricing

Predatory pricing is a type of unlawful predation in which the alleged monopolist sells its goods below cost, driving down the price of goods in the market so that neither it nor its

competitors can make a profit. Because the other market participants cannot make a profit, they are forced out of business. This leaves the monopolist free to raise prices for its product to supracompetitive levels and thereby recoup its previously-incurred losses. A party alleging predatory pricing must demonstrate both that: (a) the prices complained of are below an appropriate measure of the alleged monopolist's costs; and (b) that the alleged monopolist [P. 33] eventually has a reasonable chance of recouping the losses. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993) (discussing the requirements of predatory pricing and also the "general implausibility of predatory pricing"); *Rebel Oil*, 146 F.2d at 1092 (stating the test for predatory pricing).

Plaintiffs' allegations in this case essentially amount to predatory pricing on the "buying side," as opposed to on the "selling side." As stated by Dr. Pozdena, "[p]redatory bidding is the buying side counterpart to the selling side concept of predatory pricing." (Pozdena Rpt. at 23 (Tab 21).) Dr. Pozdena explains:

> It is a means of monopolization by which a firm having or wanting market power bids up input prices such that the costs of the product produced exceed the revenues received. By so doing, the predator attempts to drive rivals out of business and scare off entrants and then lower its bids for inputs and raise its output price when the rivals exit the market.

(*Id.*) Thus, instead of proving that Weyerhaeuser sold the manufactured output for too little money, resulting in a loss, Plaintiffs must prove that: (a) Weyerhaeuser sustained a loss by purchasing alder logs at prices such that Weyerhaeuser could not make a profit on their manufacture and sale as alder lumber; and (b) Weyerhaeuser has a reasonably good chance of recouping these previously-incurred losses – losses

that Plaintiffs' expert William Nelson states Weyerhaeuser has been sustaining for almost 20 years. (Nelson Rpt. at 4 (Tab 12).) Indeed, Dr. Pozdena's report shows not only that Weyerhaeuser's alder mills made profits overall, but also that incremental log purchases added to profits. (Pozdena Rpt. at 22 & Exh. 11 (Tab 21).) Thus, Weyerhaeuser's log purchase behavior survives the most stringent test of predation in that Weyerhaeuser's financial data fail to substantiate that there is any pattern, even on the margin, of Weyerhaeuser purchasing logs with the result, let alone the intention, of losing money.

The federal courts place a high burden on plaintiffs alleging predatory pricing conduct. "The Supreme Court has expressed extreme skepticism of predatory pricing claims." *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999). As stated by the Supreme Court, "the success of such schemes is inherently uncertain: the short-run loss is definite, [P. 34] but the long-run gain depends on successfully neutralizing the competition." *Matsushita*, 475 U.S. at 589. The Court in *Matsushita* further noted that "there is consens us among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* In light of such caution, "the standard for inferring an impermissible predatory pricing scheme is high." *Stearns*, 170 F.3d at 528.

Plaintiffs in this case fail to meet either element of the test for predatory pricing. First, Plaintiffs cannot show that Weyerhaeuser priced its lumber below "an appropriate level of its costs."[15] *See Brooke Group*, 509 U.S. at 222-23. In-

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[15] A number of cases have discussed what might constitute an appropriate level of costs. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1982) (discussing whether the appropriate cost measure is the defendant's variable or actual costs). Here, it is unnecessary for this Court to negotiate this issue as Weyerhaeuser's prices were not below costs by any measure.

deed, Plaintiffs fail even to allege such conduct. Second, Plaintiffs cannot show, nor do they allege, that Weyerhaeuser would have a reasonable chance of recouping the losses that would be incurred by such below-cost pricing.

With respect to the first test, Plaintiffs cannot demonstrate that Weyerhaeuser's log buying practices resulted in losses to its hardwood division. (Taylor Dec. at ¶ 9 (Tab 22).) In order to satisfy the first prong of predatory pricing, Plaintiffs must prove that "an appropriate measure" of Weyerhaeuser's costs exceeded the prices received for its lumber. *Brooke Group*, 509 U.S. at 222-23. Weyerhaeuser has consistently made a *profit* on its hardwood mill operations, including its alder mills in the Pacific Northwest. (Pozdena Rpt. at 22-23 & 23-24, Ex. 11 (Tab 21).)

Plaintiffs attempt to reduce their burden with respect to below-cost pricing. Conceding that Weyerhaeuser has not sustained losses resulting from its log purchases, Plaintiffs and their experts argue that Weyerhaeuser could have earned greater profits if only it had purchased logs at a lower price. (Deposition Transcript of William Nelson of September 12, 2002, at 77:12-78:2 (Tab 15).) This is simply not relevant. To prove predatory pricing, Plaintiffs must demonstrate that Weyerhaeuser engaged in below-cost pricing. Without this showing, Plaintiffs' predation [P. 35] argument fails as a matter of law. *See Brooke Group*, 509 U.S. at 223 ("[W]e have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws") (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)).

Plaintiffs also fail to prove the second element of predatory pricing. Plaintiffs must prove that Weyerhaeuser has a reasonable expectation of recouping its alleged losses. "For the investment [in below-cost pricing] to be rational, the [predator] must have a reasonable expectation of recovering,

in the form of later monopoly profits, more than the losses suffered." *Matsushita*, 475 U.S. at 588-89. Thus, unless Plaintiffs can show that there are high barriers to entry in the relevant market, sufficient to keep other competitors from entering and undercutting Weyerhaeuser's supracompetitive prices, summary judgment is proper. *See Brooke Group*, 509 U.S. at 226 ("In certain situations—for example, . . . where new entry is easy, . . . summary disposition of the case is appropriate."). As shown, Plaintiffs cannot prove the existence of significant barriers to entry. Thus, new firms can enter (and, indeed, have entered) the market to produce hardwood lumber. For example, within the past five years at least four mills have begun producing alder lumber in the Pacific Northwest. (Pozdena Rpt. at Ex. 10 (Tab 21).)

IV. CONCLUSION

For these reasons, Weyerhaeuser's motion for summary judgment should be granted.

DATED this 31st day of October 2002.

Respectfully submitted,

Respectfully submitted,

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By: _____

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[Defendant's Reply In Support of Motion for Summary Judgment (Nov. 25, 2002)]

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* * *

[P. 1] I. INTRODUCTION

Plaintiffs have failed to introduce any evidence showing that the proper relevant market in this case is other than the market for domestic hardwood lumber. The results of Plaintiffs' own experts' belated price correlation analysis of "first differences" (which is also the subject of Weyerhaeuser's Motion to Strike Plaintiffs' New Expert Opinions) do not even support Plaintiffs' proposed definition of an alder lumber "submarket" because those results fail to meet the Ninth Circuit's inelasticity requirement for a submarket. Regarding Plaintiffs' proposed market definition of alder logs, the cases that Plaintiffs cite in support of that market definition are inapposite to this case because they do not support defining the relevant market as the *input* market in a case between manufacturers that compete in the output market. Because Plaintiffs concede that Weyerhaeuser does not possess monopoly power in the market for the sale of domestic hardwood lumber (the only relevant market in this case), Plaintiffs have failed to create a factual issue on an essential element of their claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. Accordingly, Weyerhaeuser is entitled to summary judgment dismissing Plaintiffs' case.

Even under Plaintiffs' own putative market definitions, Plaintiffs have failed to offer specific facts showing significant barriers to entry and expansion in the alder sawmill industry. Without significant barriers to entry, Weyerhaeuser cannot possess monopoly power as a matter of law. Weyer-

haeuser is entitled to summary judgment on the separate and independent ground that, because no significant barriers to entry and expansion exist, Plaintiffs have failed to introduce evidence sufficient to allow a reasonable fact-finder to find that Weyerhaeuser possesses monopoly power in a relevant market, which is an essential element to their Section 2 claim.

In an effort to draw attention away from their lack of evidence for that essential element, Plaintiffs devote much of their brief to a recitation of the evidence supporting another element of [P. 2] their Section 2 claim, predatory conduct. They quote lengthy excerpts from deposition transcripts of several former Weyerhaeuser employees, which Plaintiffs contend establish that Weyerhaeuser has acted predatorily. Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 1-5. As acknowledged by Weyerhaeuser in its Memorandum in Support of its Motion for Summary Judgment, when the factual evidence is viewed in the light most favorable to Plaintiffs, there are admittedly disputed issues of fact regarding Weyerhaeuser's reasons for some of its business decisions. Def's Mem. Supp. Mot. Summ. J. at 2. Thus, Plaintiffs' focus on claimed evidence of predatory conduct is misdirected because to avoid summary judgment they must come forth with specific facts sufficient to create a factual issue on the essential element of monopoly power in a relevant market, on which Weyerhaeuser has demonstrated an absence of a genuine factual issue. Moreover, Plaintiffs do not meet the only argument that Weyerhaeuser makes with respect to the predatory conduct element of their Section 2 claim: even assuming that Weyerhaeuser had a strategy to drive up the price of alder sawlogs as Plaintiffs argue their evidence shows, such a strategy would not fall within any legally recognized theory of unlawful predatory conduct.

II. DISCUSSION

A. Summary Judgment Is Not Disfavored In Antitrust Cases

Despite Plaintiffs' suggestion that summary judgment is disfavored in antitrust cases where intent and motive are at issue, courts have often granted summary judgment in favor of an antitrust defendant where there is no genuine issue of material fact. *See* Def.'s Mem. Supp. Mot. Summ. J. at 14 n.8 (citing numerous cases in the Ninth Circuit where the court granted or affirmed summary judgment in favor of an antitrust defendant). Plaintiffs address none of the nine cases that Weyerhaeuser cites in footnote 8 of its initial Memorandum where the court granted or affirmed summary judgment in favor of the antitrust defendants. Furthermore, although intent is an element of Plaintiffs' attempted monopolization claim, it is not an element of Plaintiffs' monopolization claim. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1125, 1202 (9th Cir. 1997) ("The requirements of a § 2 monopolization claim are similar [to.

* * *

[P. 16] As to the first claimed barrier, to be a legal barrier to entry, there must be more than simply a limited raw material supply, the defendant must *control* an essential resource. *See Western Parcel*, 190 F.3d at 975 (stating that "control of an essential or superior resource" can be an entry barrier). As explained in Weyerhaeuser's initial Memorandum, Weyerhaeuser does not control the alder log stock supply. Def.'s Mem. Supp. Mot. Summ. J. at 28-29.[10] Second, the courts

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[10] Although Plaintiffs rely on *Reid Brothers*, 669 F.2d 1292, for their argument that flow supply, not stock supply, is the correct reference point for measuring Weyerhaeuser's control of the alder log supply, the discussion in that case of market definition was cursory, and largely unnecessary in light of the court's findings of

have soundly rejected the argument that a dominant and aggressive competitor is itself a structural barrier to entry. *See, e.g., Syufy*, 903 F.2d at 668-69 ("[T]he government trots out a shopworn argument we had thought long abandoned: that efficient, aggressive competition is itself a structural barrier to entry."). Third, as explained in Weyerhaeuser's Memorandum, the necessity of a large capital investment does not constitute a barrier to entry. Instead, Plaintiffs must show that a new entrant "must pay more to attract those funds than would an established firm." II Areeda & Hovenkamp, *Antitrust Law*, ¶ 409c, *quoted in* Def.'s Mem. Supp. Mot. Summ. J. at 27. Finally, Plaintiffs' argument that Weyerhaeuser's "absolute cost advantage" is a barrier to entry "because [Weyerhaeuser] can use exclusionary pricing to force competitors to lose money while Weyerhaeuser still earns a profit" combines and confuses the separate elements of monopoly power and predatory conduct and is not itself a "barrier to entry." Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 19-20; see Los Angeles Land, 6 F.3d at 1427 ("[A]nticompetitive conduct by one firm against another is not an 'entry barrier.'").

E. Plaintiffs Have Failed To Introduce Any Evidence Of Unlawful Predatory Conduct

This Court need not consider the parties' arguments relating to predatory conduct if the Court accepts Weyerhaeuser's arguments about either market definition or barriers to entry [P. 17] because under either of those arguments, Plaintiffs have failed to show that Weyerhaeuser possesses monopoly power in a relevant market, which is an essential element of their Section 2 claim. Even if this Court finds that factual issues preclude summary judgment on these issues, however, Weyerhaeuser nevertheless is entitled to summary judgment

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per se violations. See the discussion of *Reid Brothers* in Section II.E below.

because Plaintiffs have failed to come forth with any evidence supporting a legally recognized theory of predation.

Plaintiffs misunderstand and do not meet Weyerhaeuser's legal argument that they have failed to allege *any* cognizable theory of monopolization or attempted monopolization. *See* Def's Mem. Supp. Mot. Summ. J. at 29-32 (arguing that Plaintiffs are alleging a theory of monopolization known in academia as "raising rivals' costs" and that no court has accepted that theory under circumstances similar to this case). Instead, Plaintiffs spend much of their brief in a lengthy recitation of alleged facts (including quotations from pages upon pages of deposition transcripts) that they contend establish that Weyerhaeuser acted predatorily. Pls.' Mem. Opp. Def ls Mot. Summ. J. at 1-5, 14-16. Plaintiffs' discourse of these facts, however, is irrelevant to any argument advanced by Weyerhaeuser in its Memorandum in Support of its Motion for Summary Judgment and does nothing to avoid summary judgment. For purposes of this motion, Weyerhaeuser has assumed that Plaintiffs' conduct allegations are true; Weyerhaeuser argues only that such allegations do not support the essential element of predatory conduct of Plaintiffs' Section 2 claim.[11]

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[11] Moreover, because Plaintiffs failed to authenticate the excerpts of deposition transcripts and the documents contained in the sealed exhibit attached to the Affidavit of Michael K. Kelley, they are inadmissible and cannot be considered on summary judgment. Fed. R. Civ. P. 56(e). Specifically, Plaintiffs failed to include the reporter's certification for each of the excerpts of deposition transcripts that Plaintiffs submitted in opposition to summary judgment. *See Orr v. Bank of Am.*, 285 F.3d 764, 774 (9th Cir. 2002) (holding that excerpts of deposition transcripts submitted without the names of the deponent and the action and without the reporter's certification are not authenticated and, therefore, are inadmissible and must be excluded from consideration on summary judgment). Additionally, Plaintiffs failed to cite the line numbers of the deposition transcripts on which they rely, which also is a

[P. 18] Plaintiffs' attempt to categorize their allegations as something other than a predatory pricing claim fails. Contrary to Plaintiffs' assertions, all their allegations amount to a claim of predatory pricing, because the gravamen of each allegation is that Weyerhaeuser improperly raised log costs, or increased its ability to raise log costs.[12] *See* Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209, 282 n.228 (1986) (stating that a plaintiff alleging that a defendant has unlawfully raised its rivals' costs by

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defect warranting exclusion of the evidence. See *id.* at 774-75 (holding that failure to cite page and line numbers of deposition transcripts warrants exclusion). As to the documents contained in the sealed exhibit attached to Mr. Kelley' affidavit, Plaintiffs have failed to lay on adequate foundation for the admissibility of those documents. *See id.* at 777 (excluding documents for lack of foundation). Accordingly, that evidence should be excluded from consideration on summary judgment.

In any event, Plaintiffs cannot rely on evidence of events that occurred before December 1996 to prove their Section 2 claim. A four-year statute of limitations, applies to actions brought under the Sherman Act. 15 U.S.C. § 15b. Evidence of alleged predatory acts occurring outside of the limitations period, therefore, is irrelevant, inadmissible, and should not be considered in ruling on a motion for summary judgment. Fed. R. Civ. P 56(e); *Orr*, 285 F.3d 773 ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment.")

[12] Although Plaintiffs list the various allegations in their complaint in support of their argument that they have alleged a theory other than predatory pricing, they do not state what other theory they are bringing. Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 31-32. Furthermore, they offer no evidentiary support for the allegations that they claim support a non-predatory pricing theory. Finally, to the extent that Plaintiffs have any admissible evidence of predatory conduct that falls outside of a predatory pricing claim, Plaintiffs cannot establish any causal antitrust injury. Def's Mem. Supp. Mot. Summ. J. at 3.

overbuying an input has the burden to carry the equivalent of the test for predatory pricing). To succeed on a predatory pricing claim, Plaintiffs must show that (1) Weyerhaeuser sustained a loss by purchasing logs at prices such that it could not make a profit on their manufacture and sale as lumber and (2) Weyerhaeuser eventually has a reasonable chance of recouping the losses. See Def.'s Mem. Supp. Mot. Summ. J. at 32-35 (discussing law of predatory pricing). Contrary to Plaintiffs' argument, neither *Reid Brothers* nor any other case excuses them from making that showing.

[P. 19] Citing *Reid Brothers*, Plaintiffs argue that, in resource-based industries like the lumber industry, liability under Section 2 is established by the mere showing that the defendant intended to drive its competitors out of business by raising the prices paid for the resource. Pls.' Mem. Opp. Def.'s Mot. Summ. J. at 33. Plaintiffs have seriously misread *Reid Brothers*. In that case, a log supplier proved that two mills had engaged in a *price-fixing conspiracy* to depress artificially the price of logs. 699 F.2d at 1296-98. The plaintiff in *Reid Brothers* also established that the defendants had divided the timberlands into territories and had agreed not to bid against the other for logs outside of their territories. *Id.* Price-fixing conspiracies and territorial divisions are per se violations of the antitrust laws. *Knevelbaard*, 232 F.3d at 986 (price-fixing conspiracy); *Columbia Steel Casting Co. v. Portland Gen. Elec.*, 111 F.3d 1427, 1444 (9th Cir. 1996) (territorial division). By contrast, Plaintiffs here do not bring any allegations of *per se* violations of the antitrust laws. Neither "raising rivals' costs" nor predatory pricing are *per se* violations.

In discussing the extent of the defendants' price-fixing conspiracy to depress the price of logs, the court in *Reid Brothers* noted that the defendants had used threats to stop log sellers from selling to mills that were not part of the defendants' price-fixing conspiracy. 699 F.2d at 1297. The court relied on a letter from one defendant to the other stating

that a particular competitor "'was desperately in need of timber" and was "'beginning to cause [a defendant) trouble among the so-called independent loggers' by offering higher prices for logs." *Id.* (quoting letter). The court also noted that the defendants had "bid preclusively" on timber sales. *Id.* at 1297-98. Because there was direct evidence — letters between the defendants — of the price-fixing conspiracy, and because such a conspiracy was a *per se* violation of the antitrust laws, the Ninth Circuit rejected the defendants' arguments that the plaintiff must also show that the prices that they paid for logs would not cover their marginal costs on the sale of lumber. *Id.* at 1298 n.5.

Plaintiffs here allege neither a conspiracy to fix prices nor any other per se violation of the antitrust laws. Accordingly, their reliance on *Reid Brothers* is entirely misplaced. Plaintiffs have the burden of establishing that Weyerhaeuser incurred losses by purchasing logs at prices [P. 20] such that it could not make a profit and that it has a reasonably good chance of recouping those losses. This they have failed to do. Consequently, even if Plaintiffs' proposed market definitions are correct, Weyerhaeuser is entitled to summary judgment.

III. CONCLUSION

For the reasons set forth in Weyerhaeuser's Memorandum in Support of its Motion for Summary Judgment and in this Reply, Weyerhaeuser's Motion for Summary Judgment should be granted.

DATED this 25th day of November 2002.

* * *

[Hearing Transcript (Jan. 15, 2003)]

PROCEEDINGS

[Tr. 2] THE COURT: Be seated. Good afternoon.

Let me have your appearances from my left to right. My right.

MR. WILDER: LeRoy Wilder for plaintiffs.

MR. KELLEY: Mike Kelley for the plaintiffs as well.

THE COURT: One minute. Just a minute. Okay.

MR. HAGLUND: Okay. Mike Haglund for plaintiffs.

MR. JOHNSON: Thomas Johnson for defendant Weyerhaeuser.

MR. SIMON: Good afternoon. Michael Simon for defendant Weyerhaeuser.

THE COURT: Why, I commend all of you gentlemen on an able presentation of this matter. I'm going to give you some rulings on the motions first so that we don't lose time. I want to concentrate on the summary judgment motion.

So get your pens handy and we'll start. I'm going to — I'll follow this up with a brief opinion order. The defendant's motion to exclude the [Tr. 3] testimony of Rasmussen, Tedder and Zerbe on the grounds of a violation of Daubert under Rule 702, I deny. I think it's pretty clear that that is not the type of testimony that the Supreme Court was considering in Daubert and I think Rule 702 allows it.

The defendant's motion to exclude the testimony of Nelson on the issue of monopoly power, while he isn't perhaps as qualified academically as others, I'm satisfied based on the statements filed that he has adequate knowledge to discuss that matter.

Defendant's Motion No. 3 to strike the new expert testimony of Rasmussen, Zerbe and Paul Ehinger is denied.

Those — while it is true they were late, this is a rather complex case, been going on a long time. The supplemental expert opinions were disclosed to the defendant on November 12th, 2002, and even though they were supposed to have been completed a little earlier than that, the trial was still two months away at that time. But this hearing was two months away at that time and the trial even longer, so there's adequate time to make up for that.

I would — I think the motion to strike the testimony of Ehinger on the separate ground that his report wasn't disclosed until then and because it allegedly addressed new issues, I'm going to deny that. Again, there's plenty of time. That was two months ago that it [Tr. 4] was disclosed. And under the circumstances I will allow those to stand.

None of this is any indication that their testimony is subject to receipt at a trial without argument. I will always hear argument on the admissibility of the testimony, the opinions, conclusions at the trial, and we'll take that up further at the pretrial conference.

I'll just point out by way of comment that the defendant's motion to exclude the expert affidavits on the grounds that they were prepared for the experts by the lawyers, that — that seems very ingenious. I can't imagine that most attorneys don't hear their experts and consider what they have to say and perhaps prepare the affidavits. So I'm not sure that's a worthwhile matter to bring up.

Also, something else here, the defendant's motions to strike the various deposition excerpts because the plaintiffs' counsel neglected to fax the court reporter's certification for each deposition. .That also is just a little bit ingenious. Perhaps that came from out-of-state counsel, but I think it's important if you. have an issue like that that you simply notify the other side if you think there's some technical violation. Unless there's a serious question about the accuracy of the deposition, which I don't see indicated.

[Tr. 5] The defendant also seeks to strike evidence concerning conduct that predates the four-year limitation period, but the *Reid Brothers* case cited by the plaintiff and many other cases I think indicate that you can go well beyond the statute of limitations to determine the wrongful nature of any conduct.

I think that covers all of the motions.

Are there any motions left that I haven't covered?

MR. SIMON: Other than substance summary judgment, no, Your Honor.

THE COURT: That's the only one. Yes. Well, that's the one I want to concentrate on. And I want to say again, counsel has submitted very excellent briefs, case citations.

There was one citation that I'll ask you to take a look at your files and see if you missed. I didn't find it in your briefs. It's the *Telcor Communications* case in the Tenth Circuit against Southwestern Bell. It involved the sale of — and the ownership of pay phone and stations against Southwestern Bell.

So-I don't need a comment on that right now, but if either of you have looked at that, it seems to me to perhaps bear on this issue.

I'm going to ask the defendants to make the [Tr. 6] first argument. Limit it pretty sharply to the relevant market area and the relevant product. That's really what I'm concerned with here now. And I'm not interested in a long argument or the repetition of what you put in your briefs, but simply a short and concise argument about why you don't think this is the relevant product or the relevant market.

If I understand the Plaintiffs' Complaint, the relevant product are logs. And there's a comment in the Complaint about the lumber — the ultimate lumber, but I see this from

everything I've seen so far as the plaintiffs' claim that the relevant product is the alder logs.

All right. Who's going to argue?

Mr. Simon.

MR. SIMON: Thank you, Your Honor.

I will respond immediately to the Court's specific inquiry, but at some point, Your Honor, I would very much appreciate having just a few minutes to talk about two other issues that are very important; namely, barriers to entry, or the lack of barriers to entry, and also the issue of raising rival's costs as not being a legally cognizable theory. I would appreciate some time to talk about those two issues, Your Honor.

THE COURT: I may let you do that on rebuttal.

[Tr. 7] I have a few questions in that regard myself of the plaintiff.

MR. SIMON: And with respect to the issue of logs, I would like to turn both to the Court's comment about *Reid Brothers* and also to the Court's inquiry about the *Telcor* case, the *Southwest* — the pay phones case. That came out about two monthsish ago or so thereabouts. am familiar with that case enough to at least talk to the Court about it.

I believe it was cited in the responsive brief by the plaintiff for a different point, not for anything to do with logs. But I think I understand what the Court's concern about that might be.

THE COURT: I think the thing that I find in that case that makes it clear that the Tenth Circuit said at least, that a monopsony was available as a remedy to the plaintiff, and 'I'm not sure there's any argument about that.

MR. SIMON: The main thing I would say about the *Telcor* case, Your Honor, is that the Tenth Circuit's decision,

as the Court saw when the Court read the appellate decision, was based upon a theory that was not argued below or presented at trial. The case that was presented at trial did not involve monopsony claims. That was not briefed below at trial. It wasn't argued at trial.

[Tr. 8] THE COURT: So you think that was dicta?

MR. SIMON: That was totally dicta, Your Honor. And, frankly, it's not well informed by the economic realities or the law that placed it.

THE COURT: You don't question but that there can be a monopsony theory by a plaintiff in some cases?

MR. SIMON: Absolutely. That is correct. As a matter of fact, Your Honor, we have cited in our reply brief in support of summary judgment a small handful of cases. But that's really all there are, called monopsony, but they all have one thing in common: They are always brought by the sellers of the product against the buyer.

THE COURT: Why should that be different?

MR. SIMON: The reason why that should be different is. because the essence of a monopsony case is where you have a buyer with alleged, you know, monopoly power on monopsony power, the equivalent or the buying equivalent that is so powerful that they are able to drive down the price of the products that they are buying from the sellers.

That's the essence of what monopsony powers — that's the evil of monopsony power if and where it exists. That the sole buyer, being the only one to turn to, can drive down the cost.

Now, what that usually takes — the context [Tr. 9] in which that usually occurs, Your Honor, is where there is usually — and it's always in the context also just from what I've seen, in the context of a Section 1 conspiracy as well as a

Section 2 tagalong claim. It's the idea where several buyers — well, not always. I'll come back to that. I'm sorry.

It's the idea that where the buyer, either individually or with other buyers, present themselves as the only source to which the seller can turn. They pay lower prices than they would otherwise pay in a competitive market to the seller. And the seller claims injury, competitive injury because they no longer have free market choices as a result of what that monopsony buyer or monopsony buyers conspiring together have done.

That is absolutely not anywhere remotely close to the allegations in this case.

THE COURT: I understand. But why — why couldn't a buyer, not saying he -did in this case, but why couldn't a buyer eliminate other possible buyers from the market through monopolistic treatment?

MR. SIMON: Because the other buyers that would be in the market by your hypothesis would be the competitors of that defendant buyer. That's presumably who the other buyers —

THE COURT: Well, that's what a monopoly usually [Tr. 10] works against is other competitors.

MR. SIMON: And what do they compete in? They compete in the output market. They don't compete for buying because nobody cares about buying a product, buying an input for the sake of buying an input. That's — you know, we're not — we're not in the business of just buying inputs.

The defendants here, the competitive defendants are in the business of making outputs and competing against each other with outputs.

And so the only correct way –

THE COURT: I gather from the papers to alder?

MR. SIMON: Pardon me?

THE COURT: These are alder mills, the plaintiffs and the defendants are Alder mills. That's - that's the argument.

MR. SIMON: I will concede that they primarily sell alder lumber. Now, I'll point out the name of Ross-Simmons. It's the Ross-Simmons Hardwood Lumber Company. It's the Smokey Point Hardwoods Company. The undisputed facts show, though, that although they do sell a range of hardwoods, or they did sell a range of hardwood lumbers, both the plaintiffs and the defendants primarily make alder lumber, a type of hardwood. So I will acknowledge that.

[Tr. 11] And so what they are doing, what this case — what this case is about is where you have companies that compete with each other in the output market. We say hardwood lumber, they say alder lumber. That's not an issue for right now.

And in order to compete in that market they need among other things inputs. In this case the logs. Now, what the plaintiffs are claiming is that Weyerhaeuser has done improper conduct, basically predatory and exclusionary conduct they allege which is what I would like to talk to you about later.

They claim that we have engaged in predatory and exclusionary conduct that had the affect of making them pay more for logs -

THE COURT: Not — supposedly-they couldn't get any logs?

MR. SIMON: That's correct. That is not an allegation. And that's why this is not a monopsony, a true monopsony case. They are not alleging that we have all of the logs and that the sellers of logs have no one to turn to but us.

They are claiming that as a competitive tactic in the market in which we compete the sale of lumber, hardwood or alder, in that market in which we compete, we have used as a competitive tactic paying more [Tr. 12] for the logs, the alder logs than we needed to pay or that we should have paid. Now, that is a conduct allegation.

THE COURT: Haven't they also alleged, though, that you actually dried up the supply —

MR. SIMON: No.

THE COURT: — with bad motives?

MR. SIMON: No. Ab — well, the motives I'll put aside for a moment. They do claim that our motives were to increase their price. They have presented evidence that obviously at trial we will dispute but they have presented evidence that our motives were to increase their costs of supply.

However, there is no evidence that we have in any way dried up supply or that all of the logs have become ours to the detriment of suppliers of logs-. Their claim is essentially a conduct claim. And if I can take a step back a moment, Your Honor, and state that for both the events of monopolization, the elements are monopoly power in the relevant market, and no significant barriers to entry. That's basically one element.

The second is that was obtained or maintained through exclusionary or predatory conduct. And then, of course, that causes — that causes injury to the plaintiffs.

On the attempted monopolization claim there [Tr. 13] also is a conduct element. There there is specific intent to become dangerous and to use exclusionary and predatory conduct and a dangerous probability of success. Both require predatory or exclusionary conduct.

The conduct that they allege in this case is that we paid more for logs in order to make their prices go up. Essentially

raising rival's costs. This is not a case where we have suppliers of a market saying "you, the defendant monopsonist, have completely deprived us of any ability to sell logs to anybody else.

Right now there are plenty of folks that can buy logs. There are — as we'll talk about when we talk about barriers to entry. There are new businesses that have come in, there are existing alder mills that have expanded. The sellers of logs can sell to us, they can sell to any of the other mills, and they are not complaining that they have no competitive choice.

All we have in this case, and this the gravamen of this case, and if it goes to trial, Your Honor, this is the claim that should go to the jury. The claim is that these particular competing alder or hardwood mills, Ross-Simmons, the joint venture program from Confederated Tribes and Smokey Point, they all claim that they could not survive in business because of predatory conduct that we engaged in. What was the predatory conduct allegedly that [Tr. 14] we caused them to pay more for logs.

Therefore, whether you viewed the correct market definition as alder lumber or hardwood lumber, or whether you conclude that there's an issue of fact on that point and let the jury decide whether it's hardwood lumber or alder lumber, that is the relevant market or the range of relevant market choices that should be submitted to the jury.

THE COURT: Those are product choices.

MR. SIMON: Product choices, correct.

And so that is my response. And if we take a look at *Reid Brothers*, as I said, it's a case where you have the sellers of logs, the suppliers of logs bringing a claim that the defendant buyers all conspired together to basically deny them any opportunity of choosing alternate prices.

Similarly with Southwest, as I mentioned, it is dicta and if you read in the Court of Appeals' decision, it was not the theory of which the case of the law was tried.

Now, that leaves us to this area. The relevant product market should either foe alder logs or hardwood logs as a matter of law, or the Court should find that it's a question of fact and the jury can decide that.

Now, my argument for — and, by the way, –

* * *

[Tr. 17] then you must include those things as well. And there is no dispute based upon their admission that they do compete in — with alder lumber.

Now, I was going to talk about some of our Daubert motion issues. I won't — I won't do that in light of the Court — in light of the Court's ruling.

THE COURT: No.

MR. SIMON: But I do submit that in light of, that admission, coupled with the statements that we have presented from the Ninth Circuit in terms of what is — you know, how one looks at the relevant product market, it should be a question of law for the Court to decide that based upon the evidence the correct market is alder lumber.

If the Court disagrees with that, then I suppose it's a question for the jury whether it's alder lumber or hardwood lumber, but I do submit that that is the right analysis, not going back to logs.

I think I have answered the two issues that the Court wanted me to address, and I trust at some point I'll be able to talk about barriers to entry and —

THE COURT: On rebuttal, yes, you probably will.

MR. SIMON: Thank you.

THE COURT: All right. For the plaintiff.

MR. HAGLUND: Mike Haglund for plaintiffs, Your Honor.

* * *

[Tr. 20] processor, against Sunkist that was vertically integrated and did everything including process.

Now, *Reid Brothers*, for the life of me I don't understand how they can make this argument that it has no applicability beyond a situation where it is a logger against the logger supplier of — of saw logs to the mill that has driven down prices.

The fact is that Weyerhaeuser's position, if you analyze it, Your Honor, really reduces it to this: They contend that *Reid Brothers* should be shoehorned into the following box: That Weyerhaeuser in the alder industry of the Pacific Northwest, which, by the way, is the only place it exists in all of the world, as the record makes clear, can drive all of its competitors' saw mills out of business through predatory tactics in the log markets primarily.

And the — and those competitors have no claim because you only focus on outputs, not what's being done in the input market, the raw material which is — the record also shows is the dominant cost in any sawmill. That the only viable plaintiffs after these mills are all gone, or the dominant firm has monopoly power, are the loggers who in Stage 2 see the price for their saw logs that they're selling go down because the monopolist is able — in the absence of mill processor competition is [Tr. 21] able to drive the price down.

Reid Brothers says no such thing. At the Ninth Circuit level, Your Honor, it's clear in the section that they describe as exclusion — the elimination and exclusion of competing mills -

THE COURT: Which page are you on?

MR. HAGLUND: 1297. It's clear that the Ninth Circuit actually considered the aspect of the exclusion of the competing mills.

Now, another reference in that case, Your Honor, when they get into the issue of whether the jury trial, just — it's an issue about jury demand. They note that the case was originally a companion case with four others, and this was the first one that went to trial.

This case was tried by the late Judge Dwyer when he was a well-thought-of antitrust plaintiffs' lawyer in Seattle. Judge Rothstein heard the case and 'issued an opinion that you don't find in F. Supp, but we have — it's in Westlaw and it's also in CCH, and I have a copy for the Court and a copy for opposing counsel.

If one looks at that case it's absolutely clear that Judge Rothstein found, and it was affirmed by the Ninth Circuit, that there were three different product markets, one of which was logs. And in that case she actually, referring to the — to the companion cases, [Tr. 22] there's a quote where in her conclusions of law she says quote, "The defendant monopoly power was unlawfully attained and was unlawfully exercised to the injury of, quote — this is all in quote — 'non-defendant mills and loggers in southeastern Alaska.'"

No question that as this case came up, and if you read the very comprehensive factual findings that she made, there's no question that these cases were tried as a group in effect with the first case being the key, a finder of fact against a common set of defendants. And the idea that this case doesn't have applicability because it was against two giants, who also were found to have engaged in a conspiracy in violation of Section 1 of the Sherman Act, doesn't mean it doesn't have good applicability as to the Section 2 analysis for monopolization that is set out both at the district court and the Ninth Circuit levels.

So the notion that .monopsony cases are always brought only by the sellers of the input is not correct. That is inconsistent with *Reid Brothers*, it's inconsistent with a fair reading of *Case-Swayne*, and it's inconsistent, I think, with the Tenth Circuit case that you refer to.

In that situation you have a situation where the formerly dominant — or that the dominant firm, one of the baby bells that was broken up, as — as I recall the [Tr. 23] case, in a situation where they are now poised or on the brink of having to compete for pay phone locations. And they go out in a preemptive strike effort and sign up their — as many of their existing pay phone providers, the suppliers of the pay phone locations. They're all generally leased for a share of the take from that phone.

And they went to them and used various onerous methods through contract or penalty to make it extremely hard for the new competition that was going to be able to compete for these pay — for pay phones —

THE COURT: I recall the facts.

MR. HAGLUND: — to get a foothold. That's exactly what happened in our case. We're contending that Weyerhaeuser, just like the Ketchikan Pulp in southeast Alaska used predatory practices predominately in the log market, although if you look at our Complaint we've got 16 identified items. More than just the log arena but a whole wide array of mechanisms to put out of business

Ross-Simmons which was, you know, the oldest operating alder mill in the region for over 50 years, their joint venture with the Siletz Tribe in Toledo and Smokey Point in Washington State.

So, as to the log issue, clear conflict of experts. We've got forest economists plus an antitrust economist saying it's an economically distinct market.

* * *

[Tr. 28] THE COURT: That was a new mill?

MR. HAGLUND: It was built — it was opened for alder in '96 and closed in '98.

THE COURT: Does it concern you that having opened that mill in '96, they were or should have been aware of many of these acts that you allege took place long before then?

MR. HAGLUND: Well, I think that the evidence, once we get into it in full flower in trial, will show that despite substantial efforts over a long period of time on the part of Weyerhaeuser to put Ross-Simmons out of business, Ross-Simmons had still managed to make a profit, not anywhere near the profits we now know Weyerhaeuser was making,- but it still managed to make a profit in this family-owned company that employed 200 people all the way through 1996. And had an expectation that they could continue to compete.

What Weyerhaeuser knew better than anybody else, we believe the facts will show, is that the — as we moved into this century there was going to be a greater shortage, or a constrained supply, and that as they, we believe, wanted to make sure that most of the competition was gone by the time you got to that point.

So I think they'll be able to make their argument, but the fact is Ross-Simmons and the Siletz Tribe [Tr. 29] had a reasonable basis for forming the joint venture, making the investment to reconfigure that mill and getting into this because Ross-Simmons had been an industry leader for so many years and had made profits despite the periodic and regular efforts of Weyerhaeuser to deprive them of logs or put them out of business.

And you see from Bill Nelson's declaration that, you know, he explains the sorts of things they did to try and survive during this period of time and in fact they made a profit..

The third plaintiff, Smokey Point Hardwoods, really was only in business for about six months in 1999. when they answered, were immediately absorbing 'such huge losses that they quit after six months.

I hope that responds to your question, Your Honor.

THE COURT: It does. I'll give you a few minutes.

MR. SIMON: Thank you. In light of one of Mr. Haglund's comments, if I may approach the Court's clerk, Your Honor, with something.

THE COURT: You may.

MR. SIMON: When I told the Court that the Request for Admissions submitted in the record here by Smokey Point showed that they had admitted that — and, by

* * *

[Tr. 31] Confederated Tribes' defendants in Request for Admission No. 8. They admitted that. Same as with Smokey Point. That should take care of that issue, Your Honor.

With respect to the *Reid Brothers*, I won't repeat myself other than to say that that was a case of the suppliers or the sellers of logs bringing a case against the buyers. That's where monopsony belongs.

With respect to *Case-Swayne*, all I have to say is that's not a monopsony case, that was a case where a juice manufacturer, *Case-Swayne*, claimed that it couldn't buy oranges any more from the producer of the product oranges, the Sunkist Growers.

And that was a classic case of monopoly. They said you — you control all of the oranges, you're not selling them to us, we are the buyer, we are suing you for monopoly says *Case-Swayne* against *Sunkist*. Well, that might have some applicability if these plaintiffs were ever -buying logs from

Weyerhaeuser, but there's no evidence that they ever were. So *Case-Swayne* has no applicability here.

And so I'll just reiterate that this is not a monopsony case according to any precedent that we have seen.

I do now appreciate just a few minutes to speak about the barriers to entry and then I'll close by raising rival's costs.

* * *

[Tr. 34] capital market evaluations imposing higher capital costs on new entrants or, in certain cases, economies of scale. And I'm citing the leading Ninth Circuit case Level Oil for that.

There is no evidence that any of those and no genuine issues –

THE COURT: Isn't there evidence of control of a substance, that is timber?

MR. SIMON: No. What — what — there is not evidence that there is control over an essential or superior resource such as timber in this respect. That type of entry barrier looks to be at the control over an essential supply. If all of the competitors had to come to us to get access to a particular supply or input, or logs, that would be an entry barrier.

THE COURT: Isn't that about what they've alleged and showed?

MR. SIMON: Absolutely not, Your Honor, and here's why: Because nobody had to come to us to get logs because we don't sell logs to any of the plaintiffs or any other mills. We all —

THE COURT: They're not available then. If in fact through anti-competitive practices Weyerhaeuser has made those logs unavailable, isn't that control of a resource?

[Tr. 35] MR. SIMON: No. And the reason why is we're confusing the conduct elements with the barriers to

entry elements. The undisputed facts show that of the logs that Weyerhaeuser actually has control over, it's less than 7 percent. And all of the case law says that, you know, under 20 percent is just not even an issue.

Now, what they are complaining about is that who has control over the logs. All of the sellers of the logs. The suppliers of the logs. And they go to-those suppliers and buy logs and the competitors go to suppliers, competitive mills, go to those suppliers and buy logs, and we go to the suppliers and buy logs.

And they are not complaining that we have even bought up all the logs and none are available to them. That's not even their complaint. And even then that wouldn't be control over resource because we don't control that, we just bought it in the open markets.

What their complaint is, and this is the conduct part that said what is to raising rival's costs. What their complaint is that when we all go out together into the forest to bid against each other and compete for the buying of logs, they say that we pay more than we have to, more than we need to. That raises everybody's costs up, and that causes them to have to pay higher costs for their logs. They're not claiming that they don't get logs, [Tr. 36] they're claiming that they have to pay more for the logs. Now –

THE COURT: I think I understand.

MR. SIMON: And because they have to pay more for logs, obviously so do we. And, frankly, if we buy more logs than they do, and I think that's pretty' undisputed for the record, then we're raising our own costs more than we're raising there's, and so how do they claim that that has hurt them?

They claim that that has hurt them because we are more efficient, we are more efficient producers of lumber from timber or from logs and therefore we can still make money,

we can still make a profit even if we have to pay more for logs to furnish our customers.

They say they have lower margins, they can't keep up with us and therefore they're out of the business. Now, that happens to be their allegation for these three plaintiffs: Smokey Point, Ross-Simmons and their joint venture partner, the Confederated Tribes. However, that doesn't even address the other competitors that have entered into the business, that have stayed in this business for a long time.

And that leads to the final point that I want to make, that let's assume that for purposes of summary judgment that their allegations are right. Where [Tr. 37] does that leave us? That leaves us with — first of all, it's undisputed that we don't lose money in these operations, they're just complaining — their complaint is that we could have made a higher profit.

So there's no allegation of predatory pricing, there's no allegation that we have increased our costs so much that we end up losing money when we sell the lumber. That is not in this case. It's undisputed that we don't do that.

So all they're complaining about is that we are somehow able to better afford because we're more efficient. We're better able to afford to pay more for the resource that we then get than they are. And when they had to, you know, match those prices in order to-get the logs, these particular plaintiffs had problems.

That is part of their conduct allegations, Your Honor, and I submit that there is absolutely no legal precedent that says that that is predatory or exclusionary conduct.

Especially in the case — I'll wrap it up right now, Your Honor, with these one or two points on this issue: The concept of raising rival's costs appears very infrequently in the legal literature, in the legal case law as we've identified. It appears sporadically in the economic literature, but always in

this context: Both in [Tr. 38] the law as well as in the economic literature.

If a particular party — the defendants, if a defendant can raise its rival's costs, are they without raising its own costs or without raising its own costs very much?

Some economists, and this is controversial within the economic community, some economists say that might be a predatory mechanism that the antitrust laws should prevent.

As I said, the case law has not yet gone that far. But nobody, not the economists and not the case law, has ever confronted a situation like we have with their allegation; namely, their claim that we have raised their costs of logs as well as our own. And, frankly, that. we've raised our own costs as much if not more.

But you take a look at their allegations from, I think, William -Nelson, their expert put this in, or their fact witness put this in, that he claims we've been doing this for 20 years. He claims that we have been. paying more for logs than we needed to. One of their other witnesses, one of our —

THE COURT: I'm going to have to cut you off. We've got another matter that I have to take care of this afternoon, too.

I'll give you just a couple of minutes, Mr. [Tr. 39] Haglund.

MR. HAGLUND: Yes, Your Honor..

The most fundamental point I'd like to make is that their own witness, an ex-senior executive number two person in the division, admits that they had regular monthly meetings at which the issue of using log costs, pushing them up to drive out competition was discussed; that they had ultimately decided that it was a good thing to do in the short term in order to reap much longer term profits. And that's completely

consistent with the kind antitrust claim that the law recognizes.

As to the admissions that Mr. Simon submitted. I stand corrected, those were answered in the fashion shown and — but it's not dispositive.

THE COURT: I can understand that issue.

MR. HAGLUND: Okay.

THE COURT: All right.

MR. HAGLUND: Thank you, Your Honor.

THE COURT: I thank you, gentlemen, very much for your excellent arguments. I'll give you an answer very shortly. I came into this case very recently but I'll be on top of it very soon.

MR. SIMON: Thank you, Your Honor.

THE COURT: We'll be in recess on this case. Is our other case ready to go?

[Tr. 40] (Concluded)

I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature is not certified.

/s/
DENNIS R. GRUBE
Official Court Reporter

8-22-03
DATE

[Opinion Denying Summary Judgment (Jan. 21, 2003)]

PANNER, J.

Plaintiffs Confederated Tribes of Siletz Indians of Oregon, Smokey Point Hardwoods, Inc., and Ross-Simmons Hardwood Lumber Co., bring this antitrust action against Defendant Weyerhaeuser Company. The Third Amended Complaint alleges that "Plaintiffs are the owners and operators of three alder sawmills in Oregon and Washington that were forced out of business in 1998-2001 as a result of defendant's illegal anti-competitive actions." Plaintiffs seek a total of $36.6 million in compensatory damages, before trebling, plus attorney fees and costs.

Defendant has moved for summary judgment. Also pending are Defendant's Motion to Exclude Plaintiffs' Experts' Testimony, and Defendant's Motion to Strike Plaintiffs' New Expert Testimony. Defendant's reply brief also requests that certain of Plaintiffs' exhibits be stricken. All of the foregoing motions are denied.

Defendant's Motions to Exclude and to Strike

1. Defendant's Motion to Exclude (Rasmussen, Tedder, and Zerbe)

This motion seeks to exclude the testimony of Plaintiffs' expert witnesses on Daubert grounds. Rule 702 provides that:

> [P. 3] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant argues that economists Mark Rasmussen, Dr. Philip Tedder, and Dr. Richard Zerbe failed to use what Defendant believes to be the only proper methodology for defining the relevant market and showing that the Defendant possesses monopoly power. Although the Supreme Court has expanded Daubert to other expert fields, this does not appear to be what the Court had in mind when it authorized the trial courts to exclude "junk science." Rather, Defendant is arguing the merits of this antitrust case under the cloak of a Daubert motion. In deciding whether to grant summary judgment, this court is free to look beyond the expert's bottom-line conclusions. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435-36 (9th Cir. 1995). If the expert opinions fail to establish the essential elements of Plaintiffs' case, then the remedy would be to grant summary judgment, not to exclude those opinions as "unreliable."

2. Defendant's Motion to Exclude (Nelson)

Defendant moves to exclude the expert opinion of William Nelson on the ground he is unqualified to offer an opinion because he is not an economist by training. Nelson has over [P. 4] 25 years of experience managing alder sawmills in the Pacific Northwest. Knowledge of the local lumber market, the suppliers, their purchasing practices, historical prices, plus an understanding of the reasons why customers purchase alder (rather than some other hardwood) for a particular application, are all useful in defining the relevant market and understanding whether Weyerhaeuser possesses, or has attempted to acquire, monopoly power.

Defendant also contends this opinion should be excluded because Nelson failed to fully disclose the "methodology" underlying his conclusions, or provide the "quantitive data supporting that opinion." Instead of books and academic theories, Nelson based his opinion upon his extensive personal experience and knowledge of the timber market in this region. Under the circumstances of this case, that does not

justify excluding his opinion. *Cf. Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 768 n.3 (9th Cir. 2001) . The opinion of an expert derived from real world experience can be as valid as the opinion of an economist whose only knowledge of a sawmill comes from reading *National Geographic*.[1] Defendant may cross-examine Nelson and offer its own expert opinions. The jury will decide how much weight to give to their respective conclusions.

[P. 5] **3. Defendant's Motion to Strike New Expert Testimony (Rasmussen, Zerbe, and Ehinger)**

After Defendant moved to strike Plaintiffs' expert testimony because the experts did not analyze the data in the manner that Defendant contends is legally required, Plaintiffs instructed their experts to perform the analysis that Defendant said was missing. Defendant now moves to strike the expert affidavits of Rasmussen and Zerbe on the ground that these additional conclusions were not disclosed to Defendant until November 12, 2002. Defendant argues that any expert studies had to be completed by October 24, 2002, when expert discovery closed.

I deny the motion. The supplemental expert testimony was generated in direct response to Defendant's attack upon the original expert reports. Plaintiffs first learned of Defendant's contentions after the discovery deadline, and acted promptly to remedy the alleged deficiency. Some courts have granted a motion to strike in similar circumstances, reasoning that a Plaintiff may not wait until the Defendant files for summary judgment, and points to the holes in the Plaintiff's case, before belatedly plugging those holes with a new expert opinion. However, that rationale places undo emphasis on

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[1] That is a general principle, not a characterization of the particular expert retained by Defendant. Dr. Pozdena's report indicates that he has more than 20 years of experience researching the forest products industry.

law as a contest of skill between rival lawyers, at the expense of doing justice. At this stage of the proceedings, if there is sufficient evidence to support the Plaintiffs' case, I will not exclude that evidence simply because Plaintiffs failed to anticipate the need for it until [P. 6] the defect was pointed out by their opponent. The court is not grading a law school moot court exercise. Nor is this a situation in which the Plaintiff has completely changed the version of events he told at deposition in order to forestall defeat, *i.e.*, a "sham" affidavit. Finally, trial is not until April 2003, so there is little risk of unfair prejudice.

Defendant also moves to strike the expert testimony of Paul Ehinger, on the ground his report was not disclosed until November 11, 2002, and because it allegedly addresses a "new" issue. Plaintiffs counter that this report simply responds to Defendant's motion for summary judgment, which asserts that Plaintiffs cannot show significant barriers to entry of the relevant market, which is an essential element of their antitrust claim.

Plaintiffs should have anticipated the need for testimony on this issue, and not waited until a summary judgment motion was pending before obtaining an expert report that was necessary to establish an essential element of their case. However, I will not preclude Plaintiffs from presenting that evidence now that the deficiency has been called to their attention. In addition, Plaintiffs told Defendant on Oct. 24 that they were in the process of obtaining an expert affidavit from Ehinger, and disclosed the subject matter (though not the substance) of his testimony. Defendant was on notice that Ehinger had been retained and the general scope and purpose of his report.

[P.7] Given the time remaining until trial (Defendant received this report in early November and the trial is not until April), there is little *unfair* prejudice in allowing this testimony. Having to go to trial, instead of prevailing on sum-

mary judgment, is not unfair prejudice. If Defendant requests, I will allow Defendant to depose any new experts (or on any new opinions) and file any responsive expert disclosure reports.

4. Defendant's Motion (in footnote 11 of its Reply Brief) to Strike Various Documents

Defendant seeks to strike various deposition excerpts because Plaintiffs' counsel neglected to attach the court reporter's certification. That defect can easily be remedied (and, in fact, was cured almost two months before oral argument) . Defendant also complains that Plaintiffs didn't cite the specific line numbers of the testimony they rely upon, citing the page numbers instead. Again, the defect (if any) is readily curable.

Next, Defendant seeks to strike evidence concerning conduct that pre-dates the 4-year limitations period. However, evidence of events occurring more than four years prior to the filing of an antitrust complaint may still be admissible for various purposes, *e.g.*, to establish the wrongful nature and character of the defendant's conduct during the limitations period. *See Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1305-06 (9th Cir. 1983). Therefore, I deny that request.

[P. 8] Defendant raises other arguments, none of which have merit. All of Defendant's motions to strike and to exclude testimony are denied.

Defendant's Motion for Summary Judgment

Plaintiffs cite a handful of musty cases for the proposition that summary judgment is disfavored in antitrust cases. That is no longer true. The usual summary judgment standards apply. *See, e.g., Geneva Pharmaceuticals Tech. Corp. v. Barr Labs.*, 201 F. Supp.2d 236, 266 (S.D.N.Y. 2002) (rejecting identical argument).

The elements of a claim for monopolization under Section 2 of the Sherman Act are "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). "Monopoly power" is "the power to control prices or exclude competition" from the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The plaintiff must also show that it suffered a "causal antitrust injury." *Smilecare Dental Group v. Delta Dental Plan of Calif., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).[2]

[P. 9] A claim for attempted monopolization under Section 2 of the Sherman Act requires proof of the following: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of successfully achieving market power in the relevant market; and (4) causal antitrust injury. Id.

The Third Amended Complaint, simply stated, alleges that the Plaintiffs owned alder sawmills in Oregon and Washington, but did not have their own timber supply (or at least not enough logs to keep their mills running). The plaintiffs had to buy logs on the open market. Weyerhaeuser allegedly took various wrongful actions aimed at tying up the available alder timber, intentionally raising the price that Plaintiffs had to pay for logs, and otherwise preventing the Plaintiffs from

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[2] "Causal antitrust injury" means an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield v. USA Petroleum*, 495 U.S. 328, 334 (1990). "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." Id. at 344.

obtaining an adequate supply of red alder logs, at a reasonable price, to operate their sawmills. The net effect (and intent) was to destroy competition, leaving Weyerhaeuser with a monopoly in the alder market in this region, able to dictate both the price paid to alder producers for their logs and the price paid by consumers for finished alder lumber.

For purposes of this motion only, Weyerhaeuser concedes [P. 10] that its intentions are a disputed factual question. Assuming the truth of the evidence proffered by Plaintiffs, a jury could find that Defendant has engaged in wrongful conduct aimed at destroying competition, and which might be viewed as economically irrational but for its adverse effect on competition.[3] The record also suggests that the number of non-Weyerhaeuser alder sawmills in this region has declined precipitously in recent years, though the parties dispute the reasons for (and legal significance of) that decline.

Weyerhaeuser's principal argument for summary judgment is that it does not possess a monopoly in the relevant market, properly defined. The relevant market for antitrust purposes is generally defined in terms of the "product market" and "geographic market." "[A] product market is typically defined to include the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). *See also E. I. du Pont de Nemours*, 351 U.S. at 394-95 (commodities reasonably interchangeable by consumers for the same purposes constitute the product market). *But cf. Rebel Oil*, 51 F.3d at 1436 [P.

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[3] I recognize that Defendant has evidence it believes depicts a very different picture of Weyerhaeuser's actions, and the reasons why the Plaintiffs' sawmills are now out of business. However, on a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party.

11] (court must consider elasticity of supply as well as that of demand).

"Cross-elasticity of demand" between products is "the extent to which consumers will change their consumption of one product in response to a price change in another." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 469 (1992). For instance, if consumers would simply shift to Chevrolet cars in the event that Ford cars become too expensive, then the relevant market may be "cars" in a particular price range and not just the universe of "Ford cars." "Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999).

The "geographic market" is the area of effective competition where buyers can turn for alternate sources of supply. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). If small changes in the price of a product in one location will cause customers to turn to alternatives available in another location, then these sources are part of the same relevant market.

The definition of the relevant market is, ultimately, a mixed question of fact and law for the jury. *See Forsyth*, 114 F.3d at 1476. Unless the Plaintiffs' market definition is wrong as a matter of law, or unsupported by the record, it is an issue for the jury to decide. *Id.* at 1477 (denial of [P. 12] summary judgment proper even though the court thought the defendant's evidence was more persuasive).

Defendant contends the relevant market is *all* finished hardwood lumber, nationwide (or perhaps even internationally), and that Weyerhaeuser controls just over two percent of this market. Plaintiffs point to two relevant markets[4]: (1) the

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[4] Plaintiffs repeatedly use the term "submarket," as do some Ninth Circuit opinions. *See, e.g., Morgan, Strand, Wheeler & Biggs*, 924

market for finished *alder* lumber, of which Weyerhaeuser allegedly has a 75 percent share, and (2) the market for alder sawlogs in the Pacific Northwest, of which Weyerhaeuser allegedly has a 65 percent share.

Red alder is harvested in commercial quantities almost exclusively in the Pacific Northwest. According to Plaintiffs' experts, sawlogs must be processed soon after cutting, and cannot feasibly be transported long distances or stockpiled indefinitely. There are special sawmills dedicated to producing alder lumber, as opposed to other species. Those mills cannot readily utilize other varieties of timber, nor are sufficient quantities of other hardwood sawlogs available in this region to keep a mill running, and it is not feasible [P. 13] to import sawlogs from other regions even if they were available. Alder is distinct from other hardwoods, both in uses, grading, and pricing. *See, e.g.*, Wheeler Declaration. Defendant's expert disputes many of these assertions, but the court cannot resolve that dispute on summary judgment.

Defendant also relies upon Plaintiff Smokey Point's response to Request for Admission No. 5[5], but the question was ambiguous. It is unclear whether Smokey Point was admitting that red alder lumber can serve as a substitute for other hardwoods – because of alder's superior qualities – or admitting that other hardwoods can readily replace alder. In

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F.2d at 1490 ("A submarket exists if it is sufficiently insulated from the larger market so that supply and demand are inelastic with the larger market.") However, the concept of a "submarket" adds little to the analysis. *See, e.g.*, Phillip Areeda, ANTITRUST LAW, ¶ 533 (2d. ed 2002) ("[s]peaking of 'submarkets' merely confuses the issue"). The task is to define the relevant market in a given case, which is a fact-based inquiry. That the relevant market may be defined more narrowly in a given case does not change the ultimate inquiry.

[5] The identical question and answer are in the requests for admissions posed to the other Plaintiffs (though numbered differently).

addition, there are varying degrees of substitutability. *See* Pozdena Report, p. 11; Wheeler Decl. *See also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975) ("where there is a *high degree* of substitutability . . . two [products] should be considered in the same market") (emphasis added). Finally, the record indicates that particular grades of alder are used for very different purposes. It may be that other hardwood species are readily substituted for the low grade alder used to make pallets, but not for the high grade alder used to make furniture or guitars. On this record, I cannot say. The requested admission lacks essential details and cannot bear the great [P. 14] weight Defendant places upon it.

Defendant next argues that sawlogs are not the end product, and the antitrust laws exist to protect consumers, so the only relevant market is finished lumber. However, the antitrust laws apply to inputs as well as outputs. *See Telcor Communications, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1132-36 (10th Cir. 2002) (relevant market from perspective of those Plaintiffs was pay phone locations, rejecting contention that relevant market must be viewed from perspective of retail end-users, for whom cell phones could be a substitute product).

The protections of the Sherman Act are not limited to individual retail consumers. "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (citations omitted).[6]

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[6] The continuing validity of this principle was restated in *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982).

See also American Ad Management, Inc. v. General Tel. Co. of Calif., 190 F.3d 1051, 1057-58 (9th Cir. 1999) (a plaintiff need not be a consumer to establish antitrust injury).

[P. 15] Much of the finished alder lumber is itself an "input" that will be purchased by other businesses and transformed into furniture, guitars, and other products. Nevertheless, the antitrust laws guard against a monopoly in the sale of those inputs. *Cf. R.C. Dick Geothermal Corp.*, 890 F.2d 139, 143-44 (9th Cir. 1989) (en banc) (relevant market was steam, which is not a final retail consumer product but merely an input to be used by other businesses); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 457 (9th Cir. 1966) (relevant market was oranges available at a reasonable price to orange juice manufacturer, even though oranges was not the final product but only an input), *reversed on other grounds*, 389 U.S. 384 (1967). Likewise, a business can also be a "consumer." If Weyerhaeuser has monopolized the market for alder sawmill logs, it is immaterial that the victims are other mills. *Cf. Case-Swayne*, 369 F.2d at 457 (immaterial that plaintiff was rival juice manufacturer rather than ultimate consumer, and market monopolized was the input and not the retail juice market).

Defendant argues that such an antitrust claim has to be asserted by a seller of timber, not a rival buyer of logs. However, the Plaintiffs in *Telcor* were not sellers of pay phone locations, but would-be competitors of Southwestern Bell unable to gain a toehold in the market because of Southwestern Bell's alleged stranglehold over pay phone locations that was perpetuated by anti-competitive practices. Likewise, the [P. 16] plaintiff in *Case-Swayne* was a rival juice manufacturer unable to obtain oranges due to Sunkist's alleged anti-competitive practices. Plaintiffs make analogous allegations here.

It also seems appropriate to limit the sawlog market geographically. From the Plaintiffs' perspective, it is of little

solace that cherry sawlogs may be available in the southeastern United States, if – as a result of anti-competitive conduct – no logs are available, at a reasonable cost, to feed their mills here in the Pacific Northwest. *Cf. Mandeville Island Farms*, 334 U.S. at 236 ("Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned.").

As Defendant acknowledges, this is an area of antitrust law on which even experts disagree. For purposes of this summary judgment motion, it is not necessary to resolve all those disagreements or to articulate a grand theory of antitrust law. I am satisfied that Plaintiffs have stated a claim upon which they may be entitled to relief, assuming the jury finds that the evidence at trial supports Plaintiffs' contentions.

Defendant next argues that there are no significant [P. 17] barriers to entry,[7] based upon the cost of opening a sawmill, and the alleged entrance of other competitors. Some of these facts are disputed. *See, e.g.*, Ehinger Decl., ¶ 10. A jury could also find other barriers to entry beyond the mere cost to outfit a sawmill, including the alleged monopolization of inputs (*i.e.*, alder sawlogs) and a history of alleged anti-competitive conduct. *Cf. Telcor Communications*, 305 F.3d 1124 (prospective competitors unable to obtain suitable locations for their pay phones, coupled with history of anti-competitive conduct by Southwestern Bell).

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[7] Entry barriers are "additional long-run costs that were not incurred by the incumbent firms but must be incurred by new entrants." *Rebel Oil*, 51 F.3d at 1439, citing *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993). Examples of such barriers include: (1) license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and (5) economies of scale. *Id.*

Defendant also asserts that "'raising rivals' costs,' at least in the form that Plaintiffs present in this case, has never been accepted by any court as the basis for the predatory conduct element of a Section 2 claim, especially in the absence of proof that such conduct caused the defendant to operate at a loss or that such conduct raised the costs of the defendant's rivals disproportionately greater than it raised the defendant's own costs." Defendant further argues that "even if predatory pricing may be considered to be predatory conduct in violation of Section 2, merely reducing one's [P. 18] profit margins to gain a competitive advantage while still selling at a profitable level can *never* be predatory conduct as a matter of law."

In *Forsyth v. Humana*, the Ninth Circuit held that a hospital's "alleged policy of funneling indigent and low-paying patients to competitors raises a factual question whether such conduct *increased the operating costs of those competitors* by imposing on them the costs of caring for indigent patients." 114 F.3d at 1478 (emphasis added). "[T]hese anticompetitive practices enabled Sunrise to, and it did, charge higher prices for hospital services. These higher prices translated into higher copayments and premium payments. Such an increase in consumer prices caused by the asserted conduct would constitute antitrust injury of the type the antitrust laws were designed to prevent." *Id.*

Forsyth may be distinguishable because the plaintiffs were employees and employers complaining about high health care premiums, rather than competitors of Humana. However, Forsyth cited other authorities. *See, e.g., Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1553 (10th Cir. 1995) (monopolist's practice of scheduling courses to conflict with competitor's course could raise competitor's costs, and therefore, "would qualify as anticompetitive conduct"); *Premier Electrical Const. Co. v. Nat'l Electrical Contractor's Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (when

defendant [P. 19] raised its rivals' costs, it raised the market price to its own advantage); T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 235-62 (1986).[8] Purposely inflating a competitor's costs can, in some instances, be anti-competitive.

Defendant is correct that, at least in the foregoing instances, the increase in costs disproportionately favored the Defendant. However, when competitors lack deep pockets, a monopolist may be willing to raise both its competitor's costs, and its own costs, in the short run, to be rid of those competitors in the long run. That is little different from predatory pricing aimed at putting the competition out of business.

In addition, Weyerhaeuser allegedly would have earned a much greater profit on alder sales, at least in the short run, but for the anti-competitive conduct complained of. I see no practical difference between predatory pricing that results in a company purposely selling a product at a loss of one cent per unit, versus selling the same product at a profit of only one cent per unit when the company would have earned a larger profit but for its anti-competitive conduct. Assuming the [P. 20] truth of the Plaintiffs' contentions, a jury could find that the conduct Weyerhaeuser allegedly engaged in would have been "economically irrational but for its adverse effect on competition." Some courts have deemed this sufficient to constitute anti-competitive or predatory conduct for purposes of proving a Section 2 violation. *See also* Pozdena Depo. at 33-34 (such conduct might be proscribed by the an-

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[8] *Cf. Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368-69 (9th Cir. 1988) (discussing when a monopolist's refusal to aid a competitor violates the antitrust laws). Clearly antitrust liability may be premised upon theories other than mere predatory retail pricing.

titrust laws if it "had no legitimate purpose" and was aimed at destroying competition).

Of course, there is a critical distinction between deliberately driving up costs for the purpose of destroying competition and letting logs rot in the yard just to keep competitors from obtaining those logs for their own mills, versus outbidding rivals for scarce resources that both companies require with any price increase resulting from normal market forces when demand exceeds supply. The former may be unlawful anti-competitive behavior, while the latter is simply business. The antitrust laws exist to protect competition, not to protect specific companies from the effects of legitimate competition. A firm may also acquire and maintain a monopoly simply by being a better competitor or having better production methods; the Sherman Act does not outlaw such monopolies nor is it intended to shield inefficient competitors from competition. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991). However, at this stage in the proceedings [P. 21] the court is unable to say, as a matter of law, that Weyerhaeuser's conduct did not violate the Sherman Act.

Defendant also argues that Plaintiffs' theory of the case is irrational, because Defendant could have bought the Plaintiffs' mills for less than it allegedly spent to drive them out of business through other means. Even assuming those figures are accurate, it does not mandate a grant of summary judgment. For one thing, this argument assumes that Defendant knew the eventual cost from the start. That is not always the case, as many a car owner has discovered after spending more money to repeatedly repair the car than it would have cost to simply replace it at the outset. A jury might ultimately find Defendant's argument persuasive, but it does not carry the day here.

Defendant advances several other arguments, but they do not alter the result. Plaintiffs have made a sufficient showing

to survive a motion for summary judgment. There are conflicting expert opinions, theories of the case, and explanations for Weyerhaeuser's conduct and the reasons why the Plaintiff sawmills went out of business. The parties also are far apart on the issue of damages, if Plaintiffs do prevail on liability.

Conclusion

Defendant's Motion (# 46) to Exclude Plaintiffs' Experts' Testimony is DENIED. Defendants' Motion (# 67) to Strike Plaintiffs' New Expert Opinions is DENIED. Defendant's [P. 22] additional Motions to Strike (contained in footnote 11 of its Reply brief, # 66) are DENIED. Defendants' Motion (# 42) for Summary Judgment is DENIED.

DATED this 21st day of January, 2003.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT JUDGE

[Plaintiffs' Proposed Jury Instructions (Feb. 14, 2003)]

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[P. 11] MONOPOLIZATION - GENERAL

Instruction No. _____

Elements of Monopolization

Plaintiffs allege that they were injured by defendant's unlawful monopolization of the Pacific Northwest alder sawlog market, and the finished alder lumber market in the domestic United States. To win on a claim of monopolization, a plaintiff must have prove each of the following elements by a preponderance evidence:

First, that defendant had monopoly power in a relevant market.

Second, that defendant willfully acquired or maintained that power through restrictive or exclusionary conduct;

Third, that defendant's activities occurred in or affected interstate commerce; and

Fourth, that plaintiff was injured in its business or property because of defendant's restrictive or exclusionary conduct.

If you find that the evidence is insufficient to prove any on or more of these elements, then you must find for defendant and against plaintiffs on their monopolization claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-2 (3d ed. 1999) [modified];

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[P. 12] MONOPOLIZATION - GENERAL

Instruction No. _____

Monopoly Power Defined

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, plaintiff need not prove that prices were raised or that competition actually was excluded, but only that defendant had the power to raise prices or exclude competition.

Further, to conclude that defendant had monopoly power, you need not find that defendant could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that defendant did [P. 13] not have the power to control prices or to exclude competition, then you must conclude that it did not have monopoly power.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-4 (3d ed. 1999) [modified];

United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 389, 391 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

[P. 14] MONOPOLIZATION - GENERAL

Instruction No. _____

Relevant Market

Before it can be determined whether a person has monopolized a field of competition in a particular line of trade or commerce, it must first be determined what is the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market."

Charges of monopolization can only be judged in the framework of the relevant market. Plaintiffs claim that two relevant markets apply in this case: the alder sawlog market in the Pacific Northwest, and the finished alder lumber market in the domestic United States. Plaintiffs must, therefore, prove by a preponderance of the evidence what relevant market or markets apply in this case.

In determining the relevant market, the "area of effective competition" must be determined by reference to: (1) a product market and, (2) a geographic market.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-6 (3d ed. 1999) [modified];

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451, 482 (1992); [P. 15]

Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986), cert. denied, 479 U.S. 1031 and 479 U.S. 1034 (1987).

[P. 16] MONOPOLIZATION - GENERAL

Instruction No. _____

Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes from a buyer's point of view; that is, the products compete with each other. This does not mean that products must be identical to be in the same relevant product market. It means that, as a matter of practical fact and the actual behavior of buyers, the products are reasonable substitutes for the buyer's needs. In this case, plaintiffs define two relevant product markets, the alder sawlog market in the Pacific Northwest, and the finished alder lumber market in the domestic United States. Defendant denies the existence of an alder sawlog market, denies the existence of a domestic finished alder lumber market, and contends that the only relevant market is the hardwood lumber market in the domestic United States.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in the same market. You also may consider how people in the industry and the public t large view the products; whether the products have the similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are [P. 17] followed by changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market or markets, you must decide which products compete with each other. This is a practical determination. Products do not

have to be identical to be in the same relevant market, but they must compete meaningfully with each other.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-7 (3d ed. 1999) [modified];

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956); Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451, 482 (1992);

Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986), cert. denied, 479 U.S. 1031 and 479 U.S. 1034 (1987).

[P. 18] MONOPOLIZATION – GENERAL

Instruction No. _____

Relevant Geographic Market

The other aspect of relevant market to be considered is the geographic area within which the products compete. This relevant geographic market can be as large as the entire world, the United States, or as small as a single community.

Plaintiffs contend that the relevant geographic market for alder sawlogs is confined geographically to the Pacific Northwest, and that the relevant geographic market for finished alder lumber consists of the domestic United States. Defendant contends that the only relevant geographic market in this case is the United States domestic market for hardwood lumber.

The relevant geographic market is the area in which defendant faces competition from suppliers that are in the relevant product market, and to which a buyer can practicably turn for supplies.

To determine the proper geographic market, you may consider if changes in prices at one location have fairly direct substantial effects on prices or sales at other locations, and if the people in the industry and the public at large view sellers in the different locations as being in competition with each other. Such evidence would tend to prove that the different locations are in the same relevant geographic market.

You also may consider how readily sellers can and do shift from selling in one location to selling in another. [P. 19] Evidence that sellers shift readily among different locations in response to price changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where purchasers, as a practical matter, can and do buy the product; that is, whether buyers residing in one area buy from the same sources as

buyers residing in another area or if they buy from local sources rather than more distance sources because they find it more convenient or practical to do so. In this regard, you may consider whether an increase in prices charged by suppliers in one location would cause a substantial number of purchasers to turn to more remote sources of supply. If so, the two locations are part of the same geographic market.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-2 (3d ed. 1999) [modified];

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 357 (1963);

Tanka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001).

[P. 20] MONOPOLIZATION - GENERAL

Instruction No. _____

Relevant Market – Necessity of Proof

If after considering all the evidence you find that plaintiffs have proved both a relevant product market and a relevaft geographic market, then you must find that plaintiffs have established the relevant market requirement and you must consider the remaining elements of their monopolization claim. If you find that plaintiffs have not proved a relevant product market, or that they have not proved a relevant geographic market, then you must find for defendant and against plaintiffs on this claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-13 (3d ed. 1999);

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[P. 21] MONOPOLIZATION - GENERAL

Instruction No. _____

Existence of Monopoly Power

If you find that a relevant market has been proved, you should then determine whether defendant has monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling.

For example, you have heard evidence about defendant's market share. You may infer whether or not monopoly power exists from defendant's share of the relevant market, Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that defendant's share of the relevant market is less than 50 percent, that market share by itself does not permit you to infer that the defendant has monopoly power. If you determine that defendant's share of the relevant market is 80 percent or higher, that is strong evidence of the existence of monopoly power. If you determine that defendant's market share is somewhere between 50 percent and 80 percent, you may infer the existence of monopoly power from that share, and the inference is stronger the higher defendant's market share is within that range.

You may also consider the trend in defendant's market share. A declining market share may indicate the absence of [P. 22] monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of defendant's competitors. If these are few, weak, or have small or decreasing market :shares, so that they do not offer substantial

competition to defendant in the relevant market, this may tend to indicate that defendant has monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that defendant does not have monopoly power.

You also may consider the history of entry into and exist from the market by other companies. Entry of companies into the market may indicate that defendant lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate that defendant has monopoly power.

The existence of monopoly power also may be shown by evidence that defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that defendant had profit margins that were extraordinarily high or maintained high rates of return over a long period of time.

If you find that defendant had monopoly power, then you must find that plaintiff has established this requirement and you must consider the remaining elements of its monopolization claim. If you find that defendant did not have monopoly power, then you [P. 23] must find that defendant did not violate Section 2 of the Sherman Act, and you accordingly must find for defendant and against plaintiff on this claim.-

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-14 (3d ed. 1999);

U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal merger Guidelines § 1, 10-11 (1992);

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Greyhound Computer Corp., Inc. v. International Business Machines Corp., 559 F.2d 488, 498 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978); Los Angeles Land Co., v..

Brunswick Corp., 6 F.3d 1422 (9th Cir. 1993), cert. denied, 510 U.S. 1197 (1994); Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir.), cert. denied, 488 U.S. 870 (1988); Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F..3d 1421, 1439 (9th Cir. 1995), cert. denied, 516 U.S. 987 (1995); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 19896), cert. denied, 450 U.S. 921 (1981); Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1201, 1203-04 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976).

[P. 24] MONOPOLIZATION - GENERAL

Instruction No. _____

Willful Acquisition or Maintenance of Monopoly Power

The next element that plaintiffs must prove is that defendant willfully acquired or maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in securing or maintaining defendant's monopoly power.

To prove defendant acted willfully, plaintiff must prove either that defendant engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of defendant in the relevant market or that this was the necessary direct consequence of defendant's conduct or business arrangements.

You may not find that a company willfully acquired or maintained monopoly power if it has acquired or maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages, such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency resulting from [P. 25] scientific research; or by obtaining a lawful patent; or because a change in cost or taste has driven out all but one supplier; or simply because the market is so limited that it is impossible to efficiently produce the product except by a plant large enough to supply the whole demand. The acts or practices that result in the acquisition or maintenance of monopoly power must represent something more

than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

If you find that defendant willfully acquired or maintained monopoly power, then you must find that plaintiffs have established this element and you must consider the remaining elements of their monopolization claim. If you find that defendant did not willfully acquire or maintain monopoly power, then you must find that defendant did not violate Section 2 of the Sherman Act, and you must accordingly find for defendant and against plaintiffs on this claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-20 (3d ed. 1999);

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Universal Analytics, Inc. v. MacNeal-Scwendler Corp., 5914 F.2d 1256, 1259 (9th Cir. 1990).

[P. 26] ATTEMPT TO MONOPOLIZE

Instruction No. _____

Elements of Attempted Monopolization

Plaintiffs allege that they were injured by defendant's unlawful attempt to monopolize. To win on a claim of attempted monopolization, a plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that defendant engaged in predatory or exclusionary conduct.

Second, that defendant had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market;

Fourth, that defendant's conduct occurred in or affected interstate commerce, and

Fifth, that plaintiff was injured in its business or property by defendant's predatory or exclusionary conduct.

If you find that the evidence is insufficient to-prove any one or more of these elements, then you must find for defendant and against plaintiffs their attempt to monopolize claim.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-80 (3d ed. 1999);

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[P. 27] ATTEMPT TO MONOPOLIZE

Instruction No. _____

Specific Intent

If you find that plaintiffs have proved a relevant market, you must then decide whether defendant had the specific intent to monopolize that market. In other words, you must decide if the evidence shows that defendant acted with the conscious object of acquiring the power to control prices or to exclude or destroy competition in a relevant market.

There are several ways in which plaintiffs may prove that defendant had the specific intent to monopolize. There may be evidence of direct statements of defendant's intent to obtain a monopoly in a relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of defendant. You must be careful, however, to distinguish between a defendant's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Even if you decide that the evidence does not prove directly that defendant actually intended to obtain a monopoly, specific intent may be inferred from what defendant did. For example, if the evidence shows that the natural and probable consequence of defendant's conduct in a relevant market was to give defendant control over prices or to exclude or destroy competition, and that [P. 28] this was plainly foreseeable by defendant, then you may infer that defendant specifically intended to acquire monopoly power.

In this case, plaintiffs argue that some of the conduct underlying their claim of attempt to monopolize also constitutes unreasonable restraints of trade, which I will define for you. If you find that particular conduct plaintiffs contend is an un-

reasonable restraint of trade has not been proved as a substantial claim of restraint of trade, you may not consider that particular conduct in deciding whether plaintiffs have proven specific-intent to achieve monopoly power. If you find that plaintiffs have proved one or more substantial claims of restraint of trade, then you may infer from that conduct that defendant had the specific intent to achieve monopoly power.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-86 (3d ed. 1999);

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992); Aspen Skiing Co. v. Aspen highlands Skiing Corp., 472 U.S. 585 (1985).

Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1192-93 (9th Cir. 1984), cert. denied, 469 U.S. 1213 (1985).

[P. 29] ATTEMPT TO MONOPOLIZE

Instruction No. _____

Dangerous Probability of Success

If you find that defendant had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows that next element of attempt to monopolize: namely, that there was a dangerous probability that defendant would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

First, the market share and power of defendant as compared to its competitors;

Second, whether defendant's share of the relevant market was increasing or decreasing;

Third, the actual or probable impact on competition of defendant's restrictive or exclusionary acts or practices; and

Fourth, whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

[P. 30] American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-89 (3d ed. 1999);

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); States v. Columbia Steel Co., 334 U.S. 495, 533 (1948);

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1443 (9th Cir.), cert. denied, 516 U.S. 987 (1995).

[P. 31] CAUSATION

Instruction No. _____

Injury and Causation

If you find that defendant has violated Section 2 of the Sherman Act as alleged by plaintiffs, then you must decide if plaintiffs are entitled to recover damages from defendant.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.

For a plaintiff to establish that it is entitled to recover damages, it must prove that it was injured as a result of defendant's alleged violation of the antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage." Proving causation does not require a plaintiff to prove the dollar value of its injury. It requires only that a plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If you find that a plaintiff has established that it was, in fact, injured you may then consider the amount of that plaintiff's damaged. It is important to understand, however, that injury and amount of damage are different concepts, and that you cannot consider the amount of damage unless and until you have concluded that a plaintiff has established that it was in fact injured.

To establish injury, a plaintiff must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that defendant's alleged illegal conduct was a material cause of that plaintiff's injury. This means that a plaintiff [P. 32] must have proved that some damage flowed to it as a result of defendant's alleged antitrust violation. A plaintiff is not required to prove that defendant's alleged antitrust violation was the sole cause of its injury; nor need a plaintiff eliminate all other possible causes of injury. It is enough if a plaintiff has proved that the alleged antitrust violation was a material cause of its injury. Injury may be established by in-

ference or circumstantial evidence. A plaintiff's burden may vary in each case, depending upon the type of antitrust violation alleged. However, if you find that a plaintiff's injury was caused solely by something other than the alleged antitrust violation, then you must find that the plaintiff has failed to prove that it is entitled to recover damages from defendant.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, F-2 (3d ed. 1999);

15 U.S.C. § 15; Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946); Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 114 n.9 (1969); Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931);

Knutson v. Daily Review, 548 F. 2d 795, 811 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

[P. 44] MONOPOLIZATION – PREDATORY PRICING

Instruction No. _____

Elements – Predatory Pricing

Plaintiffs have alleged that defendant acquired or maintained monopoly power through predatory pricing, which is a type of restrictive or exclusionary conduct on which a claim of monopolization or attempt to monopolize may be based. After considering all the evidence, if you find that defendant has engaged in predatory pricing, then you must find that plaintiffs have established that defendant has engaged-in restrictive or exclusionary conduct and you must consider the remaining elements of plaintiffs' claim. If you find that defendant has not engaged in predatory pricing, then you must find that defendant's pricing was not restrictive or exclusionary conduct.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-50 (3d ed. 1999);

Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).

[P.45] MONOPOLIZATION - PREDATORY PRICING

Instruction No. _____

Predatory Pricing - Definition

"Predatory pricing" means charging a price or operating a business below cost, as I will define that term for you, to drive out or injure competition and with a reasonable expectation that a higher price can be charged or the business returned to profitability once the competition has been substantially lessened or eliminated.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-51 (3d ed. 1999);

Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993);

Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1298 & n.5 (9th Cir.), *cert. denied*, 464 U.S. 916 (1983).

* * *

[P. 52] MONOPOLIZATION - PREDATORY PRICING

Instruction No. _____

"Predatory Purchasing Scheme" - Definition

Plaintiffs claim that defendant engaged in exclusive or restrictive conduct called predatory pricing, which I previously defined for you. Plaintiffs claim that defendant engaged in an overall predatory purchasing scheme by paying a price for logs that is higher than market value unnecessarily to drive out or injure competition, and by delivering logs to its Longview mill at below cost. As a consequence, defendant's Longview division operated at a loss. Plaintiffs claim that defendant attempted to conceal that operating loss.

"Predatory purchasing scheme" in the context of this case means operating at a loss, as I will define that term for you, to drive out or injure competition and with a reasonable expectation that a lower price can be paid for logs once the competition has been substantially lessened or eliminated.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-51 (3d ed. 1999) (modified);

Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).

[P. 53] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030 (9th Cir. 1981) ("*Inglis I*"), *cert. denied*, 459 U.S. 825 (1982); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1308 & n.5 (9th Cir. 1983).

[P. 54] MONOPOLIZATION - PREDATORY PRICING

Instruction No. _____

"Predatory Purchasing Scheme" - Distinguished from "Competition"

In deciding whether plaintiffs have proved that Weyerhaeuser's act of operating its Longview mill at a loss was part of a "predatory pricing scheme," it is important for you to consider the evidence in light of the way in which the competitive process is expected to work.

Paying a higher price for raw materials where those resources are in limited supply and legitimately needed for production is a proper means of competing with other firms for those resources. It is not unlawful or improper.

The question you must decide is whether defendant's operations were part of a "predatory purchasing scheme." In deciding this question, you must consider whether Weyerhaeuser deliberately intended to forego present income and operate its Longview mill at a loss in order to discipline competitors or drive them out of business.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-56 (3d ed. 1999) (modified);

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1030 (9th Cir. 1981) ("*Inglis I*"), *cert. denied*, 459 U.S. 825 (1982); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1308 & n.5 (9th Cir. 1983).

[P. 55] MONOPOLIZATION – PREDATORY PRICING

Instruction No. _____

Recoupment

Paying a high price for raw materials while operating at a loss cannot be predatory under the antitrust laws where, at the time the raw materials were purchased, there was no reasonable chance that the buyer would be able to later reduce the amount it would pay for logs to an amount even lower than would be offered in a competitive market. In that way, a firm guilty of "predatory operations" could thereby make up its lost profits and obtain some additional gain. Making up lost profits in that way is called recoupment. In the context of this case, recoupment is the act of paying more than market value for logs, operating at a loss to do so with the intent to injure competition, while anticipating monopoly profits in the future.

For recoupment to occur, a predatory purchasing scheme, as a threshold matter, must be able to produce the intended effects on the firm's rivals, whether that is driving them from the market, causing them to operate without adequate raw materials unnecessarily or irrationally, or causing them to lose profits because they have had to meet defendant's artificially high prices for raw materials. Plaintiffs must prove that the scheme alleged would likely result in Weyerhaeuser being able to make up the losses for its Longview mill later by reducing the amount it would pay for logs after competition has been eliminated. To analyze whether damage to competition in this manner is likely to occur, [P. 56] you must evaluate whether the market is highly competitive, new entry is easy, or Weyerhaeuser has excess capacity or could quickly create or purchase new capacity to absorb the market share of its rivals.

If you find that Weyerhaeuser had a reasonable chance of recovering the profits it lost (from predatory log purchasing

and operating its Longview mill at a loss) through future log purchasing at lower than competitive levels, you must find that Weyerhaeuser engaged in predatory operations.

American Bar Association, SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, C-53 (3d ed. 1999) (modified);

Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1030 (9th Cir. 1981) ("*Inglis I*"), *cert. denied*, 459 U.S. 825 (1982); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1308 & n.5 (9th Cir. 1983).

* * *

[P. 62] Respectfully Submitted.

DATED this 14th day of February, 2003

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[Defendant's Requested Jury Instructions (Feb. 14, 2003)]

* * *

Defendant, Weyerhacuser Company, requests that the Court address to the jury the following American Bar Association's pattern jury instructions, the Eleventh Circuit's pattern jury instructions, and special instructions. The pattern jury instructions of the American Bar Association and the Eleventh Circuit are referenced and approved by the Ninth Circuit. See Ninth Circuit Model Civil Jury Instructions 17 (2001). Defendant reserves the right to submit additional instructions or withdraw instructions in response to any instructions that may be submitted by plaintiffs.

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[P. ii] **INDEX**

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[P. 1] REQUESTED JURY INSTRUCTION NO. 1.

Purpose

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or monopolization of any business or industry, so that the consuming public may receive better goods and services at lower cost.

The goal of the Sherman Act is to protect competition, not competitors. Conduct that is competitive, even severely so, does not violate the Sherman Act; only conduct that unfairly tends to destroy competition itself violates the Sherman Act. It is the nature of our free enterprise system that fierce, aggressive competition will drive out the least effective participants in the market, providing the most efficient allocation of productive resources. The law does not guarantee success to all of those who enter into business because it also recognizes that in the natural operation of our economic system some competitors are going to lose business, or even go out of business, while others gain and prosper.

AUTHORITY: Eleventh Circuit Pattern Jury Instructions (Civil) 3.2 (2000); American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page A-2 (1999); *Los Angeles Land Co. v. Brunswick*, 6 F.3d 1422, 1426-27 (9th Cir. 1993); *United States v. Syufy Enter.*, 903 F.2d 659, 662, 668-69 (9th Cir. 1990).

[P. 2] REQUESTED JURY INSTRUCTION NO. 2.

Elements

Plaintiffs allege that they were injured by defendant's unlawful monopolization of the alder sawlog market or the alder lumber market. To win on their claim of monopolization, plaintiffs must have proved each of the following elements by a preponderance of the evidence:

First, that defendant had monopoly power in a relevant market;

Second, that defendant willfully acquired or maintained that power through predatory or exclusionary conduct; and

Third, that plaintiffs were injured in their business or property because of defendant's predatory or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for defendant and against plaintiffs on plaintiffs' monopolization claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-2 (1999).

[P. 3] REQUESTED JURY INSTRUCTION NO. 3.

Monopoly Power Defined

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering the market.

To establish the possession of monopoly power, plaintiffs need not prove that prices were raised or that competition actually was excluded, but only that defendant had the power to raise prices or exclude competition.

Further, to conclude that defendant had monopoly power, you need not find that defendant could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that defendant did not have the power to control prices or to exclude competition; then you must conclude that it did not have monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-4 (1999).

[P. 4] REQUESTED JURY INSTRUCTION NO. 4.

Relevant Market – General

If monopoly power exists, it must be found to exist within an economically meaningful market, or what is called a relevant market.

Defining the relevant market is essential because you are required to make a judgment about whether defendant has power over prices or competition. To do so, you must be able to determine what economic forces, if any, restrain its freedom to act as it pleases. The most likely and most important restraining force will be competition from other firms and their products. This includes all firms and products that act as real and practical restraints on defendant's power to set prices as it pleases. All the firms and products that exert this restraining force are considered to be within what is called the relevant market.

There are two aspects you must consider in defining a relevant market. The first is the relevant product market; the second is the relevant geographic market.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-6 (1999).

[P. 5] REQUESTED JURY INSTRUCTION NO. 5.

Relevant Product Market

The basic idea of a relevant product market is that the products within it are reasonable substitutes from a buyer's point of view; that is, the products compete with each other. This does not mean that products must be identical to be in the same relevant product market. It means that, as a matter of practical fact and the actual behavior of buyers, the products are reasonable substitutes for the buyer's needs. In this case, plaintiffs define two alternative relevant product markets: the alder sawlog market and the alder lumber market. Defendant contends that the only relevant product market is the hardwood lumber market.

There are a number of factors you may consider in determining whether products are reasonable substitutes for each other. The basic test is whether changes in the price of one product cause a considerable number of customers to switch from one product to another. If so, the products are in the same market. You also may consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are followed by changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market, you must decide which products compete with each other. This is a practical determination. Products do not have to be identical to be in the same relevant market, but they must compete meaningfully with each other.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-7 C-8 (1999).

[P. 6] REQUESTED JURY INSTRUCTION NO. 6.

Relevant Product Market – Supply Substitutability

In some cases, it may be appropriate to take into account in defining the relevant market the makers of products that are not reasonable substitutes from the buyer's point of view. This is true where firms other than the defendant can readily use the production facilities, raw materials, and technology they had been using to make a product that is not interchangeable with the defendant's product to manufacture and sell a product that is identical to or readily interchangeable with the defendant's product. In such cases, the capacity being used to produce products that are not substitutes from the buyer's point of view but which could easily be shifted to the production of products that would be reasonable substitutes acts as a constraint on the defendant's power to set prices as it pleases.

An example may help. Suppose there are two pennant manufacturers, one of which makes Yankee pennants, the other of which makes Dodger pennants. Either company could probably shift to making pennants manufactured by the other in almost no time at all with very little effort or expense. Although Yankee fans would probably not buy Dodger pennants in large numbers, nor would Dodger fans flock to purchase Yankee pennants, the ability of one manufacturer readily to shift its capacity to the manufacture of pennants made by the other would prevent either of them from raising prices.

Evidence has been offered in this case that certain manufacturers have the capability to shift readily from their present manufacture of products that are not interchangeable with defendant's product to the manufacture of products that buyers could substitute for defendant's product. Defendant contends that softwood mills in the Pacific Northwest are capable of readily shifting from the production of softwood lumber to the production of hardwood and alder lumber.

Plaintiff contends that softwood mills cannot readily shift their production. If you find that an increase in the price of defendant's product would cause other manufacturers to shift into the manufacture of products that are interchangeable with defendant's product, then you should [P. 7] include in the relevant market the probable quantity [or value] of products that would be offered to buyers as a result of such a shift.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-9 C-10 (1999).

[P. 8] REQUESTED JURY INSTRUCTION NO. 7.

Relevant Geographic Market

The other aspect of relevant market to be considered is the geographic area within which the products compete. This relevant geographic market can be as large as the entire world or the United States or as small as a single community.

Plaintiffs contend that the relevant geographic market is the Pacific Northwest. Defendant contends that the relevant geographic market is at least the United States.

The relevant geographic market is the area in which defendant faces competition from suppliers that are in the relevant product market, and to which a buyer can practicably turn for supplies.

To determine the proper geographic market, you may consider if changes in prices at one location have fairly direct substantial effects on prices or sales at other locations, and if the people in the industry and the public at large view sellers in the different locations as being in competition with each other. Such evidence would tend to prove that the different locations are in the same relevant geographic market.

You also may consider how readily sellers can and do shift from selling in one location to selling in another. Evidence that sellers shift readily among different locations in response to price changes would tend to indicate that the different locations are in the same geographic market.

In addition, you may consider where purchasers, as a practical matter, can and do buy the product; that is, whether buyers residing in one area buy from the same sources as buyers residing in another area or if they buy from local sources rather than more distant sources because they find it more convenient or practical to do so. In this regard, you may consider whether an increase in prices charged by suppliers in one location would cause a substantial number of

purchasers to turn to more remote sources of supply. If so, the two locations are part of the same geographic market.

[P. 9] AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-11 C-12 (1999).

[P. 10] REQUESTED JURY INSTRUCTION NO. 8.

Relevant Market – Necessity of Proof

If after considering all the evidence you find that plaintiffs have proven both a relevant product market and a relevant geographic market, then you must find that plaintiffs have established the relevant market requirement and you must consider the remaining elements of their monopolization claim. If you find that plaintiffs have not proven a relevant product market, or that they have not proved a relevant geographic market, then you must find for defendant and against plaintiffs on their monopolization claim and on their attempted monopolization claim, on which I will give you instructions shortly.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-13 (1999).

[P. 11] REQUESTED JURY INSTRUCTION NO. 9.

Existence of Monopoly Power – Market Share

If you find that a relevant market has been proven, you should then determine whether defendant has monopoly power in that market. To determine whether defendant has monopoly power in the relevant market, plaintiffs must show that (1) defendant owns a dominant share of that market and (2) there are significant barriers to entry and that existing competitors lack the capacity to increase their output in the short run.

You have heard evidence about defendant's market share. Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that defendant's share of the relevant market is less than 50 percent, that market share by itself does not permit you to infer that the defendant has monopoly power. If you determine that defendant's share of the relevant market is 80 percent or higher, that is strong evidence of the existence of monopoly power. If you determine that defendant's market share is somewhere between 50 percent and 80 percent, you may infer the existence of monopoly power from that share, and the inference is stronger the higher defendant's market share is within that range.

You also may consider the trend in defendant's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor that you may consider is the number and size of defendant's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to defendant in the relevant

market, this may tend to indicate that defendant has monopoly power. If, on the other hand, they are numerous, vigorous, or have large [P. 12] or increasing shares in that market, this may be evidence that defendant does not have monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-14 C-15 (1999); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).

[P. 13] REQUESTED JURY INSTRUCTION NO. 10.

Existence of Monopoly Power – Barriers to Entry and Expansion

To establish the element of monopoly power, plaintiffs also must show that there were barriers to entry and barriers to expansion in the relevant market. A mere showing of substantial or even dominant market share alone cannot establish market power. Plaintiffs must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge defendant's high price.

Entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns. The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale.

Predatory or exclusionary conduct is not a barrier to entry and does not establish that defendant has market power. Neither is efficient, aggressive competition a barrier to entry.

You also may consider the history of entry into and exit from the market by other companies. Entry of companies into the market may indicate that defendant lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate that defendant has monopoly power.

Barriers to expansion are barriers that prevent existing competitors to increase quickly their own production in response to defendant's reduced production. Lack of excess capacity is a barrier to expansion. If existing competitors are producing at full capacity, then they may lack the ability to

increase quickly their own production in response to defendant's reduced production. On the other hand, if competitors have idle plants and can quickly respond to one firm's attempt to raise prices, then that firm would lose market share to competitors. In that instance, the firm does not have market power. In considering whether there is excess capacity, [P. 14] you should consider whether competitors have expanded production in the recent past or have the ability to expand production in the future.

If you find that defendant had monopoly power, then you must find that plaintiffs have established this requirement and you must consider the remaining elements of their monopolization claim. If you find that defendant did not have monopoly power, then you must find for defendant and against plaintiffs on their monopolization claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-14 C-15 (1999); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439-1441 (9th Cir. 1995); *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993); *United States v. Syufy Enter.*, 903 F.2d 659, 667 (9th Cir. 1990).

[P. 15] REQUESTED JURY INSTRUCTION NO. 11.

Willful Acquisition or Maintenance of Monopoly Power

The next element that plaintiffs must prove is that defendant willfully acquired or maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in securing or maintaining defendant's monopoly power.

To prove defendant acted willfully, plaintiffs must prove either that defendant engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of defendant in the relevant market or that this was the necessary direct consequence of defendant's conduct or business arrangements.

You may not find that a company willfully acquired or maintained monopoly power if it has acquired or maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages, such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency resulting from scientific research; or by obtaining a lawful patent; or because a change in cost or taste has driven out all but one supplier; or simply because the market is so limited that it is impossible to efficiently produce the product except by a plant large enough to supply the whole demand. The acts or practices that result in the acquisition or maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must

represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

[P. 16] If you find that defendant willfully acquired or maintained monopoly power, then you must consider whether defendant had a valid business reason for its conduct. If you find that defendant did not willfully acquire or maintain monopoly power, then you must find for defendant and against plaintiff on their monopolization claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-20 C-21 (1999).

[P. 17] REQUESTED JURY INSTRUCTION NO. 12.

Exclusive Contracts

Plaintiffs challenge defendant's supply contracts with Georgia-Pacific and Crown Pacific and defendant's deed restrictions as exclusive arrangements that constitute predatory or exclusionary conduct. Under an exclusive supply arrangement, a seller typically agrees to sell products for a period of time exclusively to one buyer. The supplier frequently is not allowed, for the agreed upon time period, to sell competing products from another buyer.

For defendant's supply contracts or deed restrictions to constitute predatory or exclusionary conduct, plaintiffs must have proved, by a preponderance of the evidence, that defendant's exclusive arrangements were unreasonable and substantially lessened competition in the market.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page B-113 (1999); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 856 (9th Cir. 1995).

[P. 18] REQUESTED JURY INSTRUCTION NO. 13.

Exclusive Contracts – Rule of Reason

To determine whether defendant's supply contracts or deed restrictions were unreasonable and substantially lessened competition in the market, you should consider the effect of the contract or deed restriction in the past, now and in the future. Only if you find that plaintiffs have proven a substantial lessening of competition in the market due to defendant's exclusive supply arrangements can you find that defendant's supply contracts or deed restrictions amounted to predatory or exclusionary conduct.

In deciding this issue, you should consider the structure of the market that defendant is in and the percentage of the market closed off by or tied up because of the exclusive supply arrangement or deed restriction. In this regard, you may consider how many companies are in the market and whether the exclusive supply arrangement or deed restriction significantly limited the opportunities for competing buyers to enter or remain in the market. If competing buyers were kept out of the market or left the market, this may tend to show the exclusive supply arrangement or deed restriction may be affecting competition in the market. On the other hand, if competing buyers are coming into the market or staying in the market, this may tend to show that the arrangement may not be affecting competition in the market.

It is not enough to look solely at the percentage of the market that is now closed to competing buyers by defendant's exclusive supply arrangement or deed restriction. Rather, you must consider the probable effect, both now and in the future, that the arrangement will have on competition in the market. If you find that defendant's exclusive supply arrangement or deed restriction does not and will not substantially lessen competition, then you must find in favor of defendant.

If you find that plaintiffs have proven that an exclusive supply arrangement has in the past, does now, or will in the future substantially lessen competition in the relevant market, then [P. 19] you must go on to consider whether the exclusive supply arrangement is nonetheless reasonable. Only unreasonable restraints of this type are unlawful.

In this regard, you should consider such factors as:

Whether competing buyers had alternative sources of supply;

The circumstances under which defendant set up this exclusive supply arrangement or deed restriction and what reasons it had for doing so;

The relative bargaining strength of the parties to the arrangement. If the parties had relatively equal bargaining strength, then the arrangement is less likely to be unreasonable;

How long in time the exclusive supply arrangement or deed restriction will be effective. If the arrangement will last a relatively short time and will not significantly limit the opportunities for competing sellers to enter or remain in the market, then it is less likely to be unreasonable; and

Any favorable effects on competition that the exclusive supply arrangement produces.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages B-114-115 (1999); *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997).

[P. 20] **REQUESTED JURY INSTRUCTION NO. 14.**

Valid Business Reason

If you find that defendant committed predatory or exclusionary acts or practices, then you must consider whether defendant has proven by a preponderance of the evidence that it had a valid business reason for its conduct. Examples of a valid business reason include the promotion of greater efficiency or enhanced consumer appeal. You may not second-guess whether defendant's business judgment was wise or correct in retrospect.

Plaintiffs may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.

If you find that defendant has proven that it had a valid business reason for its predatory or exclusionary acts or practices, then you must find for defendant and against plaintiffs on plaintiffs' monopolization and attempt to monopolize claim.

AUTHORITY: *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 483 (1992); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.), cert. denied, 534 U.S. 932 (2001); *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997).

[P. 21] REQUESTED JURY INSTRUCTION NO. 15.

Attempt to Monopolize – Elements

Plaintiffs allege that they were injured by defendant's unlawful attempt to monopolize. To win on their claim of attempted monopolization, plaintiffs must prove each of the following elements by a preponderance of the evidence:

First, that defendant engaged in predatory or exclusionary conduct.

Second, that defendant had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that defendant would achieve its goal of monopoly power in the relevant market; and

Fourth, that plaintiffs were injured in their business or property by defendant's predatory or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for defendant and against plaintiffs on plaintiffs' attempt to monopolize claim.

You already have been instructed on the first element of plaintiffs' attempt to monopolize claim, that the defendant engaged in predatory or exclusionary conduct. You have also been instructed regarding a valid business reason for engaging in predatory or exclusionary conduct. If you find that defendant engaged in predatory or exclusionary conduct and had no valid business reason for its conduct, then you should consider the remaining elements of plaintiffs' attempt to monopolize claim. If you find either that plaintiffs have failed to prove that the defendant engaged in predatory or exclusionary conduct, or that defendant engaged in predatory or exclusionary conduct but had a valid business reason for doing so, then you must find for defendant and against plaintiffs on plaintiffs' attempt to monopolize claim.

You also have already been instructed on two parts of the second element of plaintiffs' attempt to monopolize claim, monopoly power and the relevant market. If you find that plaintiffs [P. 22] have failed to define a relevant market, you must find for defendant and against plaintiffs on plaintiffs' attempt to monopolize claim.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-80 (1999); *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 504 U.S. 451, 483 (1992); *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997).

[P. 23] REQUESTED JURY INSTRUCTION NO. 16.

Specific Intent

If you find that plaintiffs have proven a relevant market, you must then decide whether defendant had the specific intent to monopolize that market. In other words, you must decide if the evidence shows that defendant acted with the conscious object of acquiring the power to control prices or to exclude or destroy competition in the relevant market.

There are several ways in which plaintiffs may prove that defendant had the specific intent to monopolize. There may be evidence of direct statements of defendant's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant at about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of defendant. You must be careful, however, to distinguish between a defendant's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Even if you decide that the evidence does not prove directly that defendant actually intended to obtain a monopoly, specific intent may be inferred from what defendant did. For example, if the evidence shows that the natural and probable consequence of defendant's conduct in the relevant market was to give defendant control over prices or to exclude or destroy competition, and that this was plainly foreseeable by defendant, then you may infer that defendant specifically intended to acquire monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, pages C-86 C-87 (1999).

[P. 24] **REQUESTED JURY INSTRUCTION NO. 17.**

Dangerous Probability of Success

If you find that defendant had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that defendant would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

First, the market share and power of defendant as compared to its competitors;

Second, whether defendant's share of the relevant market was increasing or decreasing;

Third, the actual or probable impact on competition of defendant's predatory or exclusionary acts or practices; and

Fourth, whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

AUTHORITY: American Bar Association, Sample Jury Instructions in Civil Antitrust Cases, page C-89 (1999).

* * *

[P. 33] DATED this 14th day of February, 2003.

* * *

[Defendant's Proposed Verdict Form (Feb. 14, 2003)]

* * *

We, the jury, unanimously find as follows:

[P. 2] **RELEVANT MARKET**

QUESTION 1:

Do you find from a preponderance of the evidence that the plaintiffs have proven a relevant market?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 1 is "No," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 1 is "Yes," proceed to answer Question 2.

QUESTION 2:

Place an "X" next to the product description that you find by a preponderance of the evidence to be the relevant product market in this case.

ANSWER:

A, Alder logs: _____

B. Alder lumber: _____

C. Hardwood lumber: _____

Proceed to answer Question 3.

MONOPOLIZATION

QUESTION 3:

Do you find from a preponderance of the evidence that there are significant barriers to both entry and expansion in the relevant market?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 3 is "No," proceed to answer Question 7, omitting Questions 4, 5, and 6.

If your answer to Question 3 is "Yes," proceed to answer Question 4.

[P. 3] **QUESTION 4:**

Do you find from a preponderance of the evidence that the defendant has monopoly power in the relevant market?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 4 is "No," proceed to answer Question 7, omitting Questions 5 and 6.

If your answer to Question 4 is "Yes," proceed to answer Question 5.

QUESTION 5:

Do you find from a preponderance of the evidence that the defendant has willfully acquired or maintained monopoly power in the relevant market through predatory or exclusionary acts or practices?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 5 is "No," proceed to answer Question 7, omitting Question 6.

If your answer to Question 5 is "Yes," proceed to answer Question 6.

QUESTION 6:

Has the defendant proven a valid business reason for the acts or practices challenged by the plaintiffs?

ANSWER: _____ (Insert "Yes" or "No")

Proceed to answer Question 7.

[P. 4] **ATTEMPTED MONOPOLIZATION**

QUESTION 7:

Do you find from a preponderance of the evidence that the defendant has engaged in predatory or exclusionary acts or practices?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 7 is "No," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 7 is "No," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 7 is "No," and your answer to Question 6 is "No," proceed to answer Question 11, omitting Questions 8, 9, and 10.

If your answer to Question 7 is "Yes," proceed to answer Question 8.

QUESTION 8:

Do you find by a preponderance of the evidence that the defendant had a specific intent to achieve a monopoly in the relevant market?

ANSWER: _____ (Insert "Yes" or "No)

If your answer to Question 8 is "No," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 8 is "No," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

[P.5] If your answer to Question 8 is "No," and your answer to Question 6 is "No," proceed to answer Question 11, omitting Questions 9 and 10.

If your answer to Question 8 is "Yes," proceed to answer Question 9.

QUESTION 9:

Do you find by a preponderance of the evidence that there was a dangerous probability that the defendant would achieve its goal of monopoly power in the relevant market?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 9 is "No," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 9 is "No," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 9 is "No," and your answer to Question 6 is "No," proceed to answer Question 11, omitting Question 10.

If your answer to Question 9 is "Yes," proceed to answer Question 10.

QUESTION 10:

Has the defendant proven a valid business reason for the acts or practices challenged by the plaintiffs?

ANSWER: _____ (Insert "Yes" or "No")

If your answer to Question 10 is "Yes," and you answered "No" to Question 3, 4, or 5, your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

[P. 6] If your answer to Question 10 is "Yes," and your answer to Question 6 is "Yes," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If your answer to Question 10 is "No," proceed to answer Question 11.

INJURY AND DAMAGES (IF ANY)

QUESTION 11:

Do you find that any plaintiff was injured in its business or property because of the defendant's predatory or exclusionary conduct?

ANSWER:

A. Plaintiff Ross-Simmons Hardwood Lumber Co.:

_____ (Insert "Yes" or "No")

B. Plaintiff Confederated Tribes of Siletz Indians of Oregon:

_____ (Insert "Yes" or "No")

C. Plaintiff Smokey Point Hardwoods, Inc.:

_____ (Insert "Yes" or "No")

If your answers to all parts of Question 11 are "No," your verdict is for the defendant. You should not answer any further questions, and your Presiding Juror should sign and date this verdict.

If you answered "Yes" to any part of Question 11, proceed to answer Question 12 for only that plaintiff that you found was injured because of the defendant's predatory or exclusionary conduct.

[P. 7] **QUESTION 12:**

State the amount of damages, if any, caused by the defendant's predatory or exclusionary conduct.

A. Plaintiff Ross-Simmons Hardwood Lumber Co.:_____

B. Plaintiff Confederated Tribes of Siletz Indians of Oregon: _____

C. Plaintiff Smokey Point Hardwoods, Inc.:_____

SO SAY WE ALL UNANIMOUSLY.

DATED _____

_____

Presiding Juror

[Fourth Amended Complaint (Feb. 27, 2003)]

* * *

I. FIRST CLAIM: MONOPOLIZATION.

INTRODUCTION

1. This is an action under the federal antitrust laws, specifically Section 2 of the Sherman Act, which prohibits [P. 2] monopolization in any segment of U.S. commerce. Plaintiffs are the owners and operators of three alder sawmills in Oregon and Washington that were forced out of business in 1998-2001 as a result of defendant's illegal anti-competitive actions.

JURISDICTION AND VENUE

2. This court has jurisdiction over the federal antitrust claims in this action pursuant to 28 U.S.C. §§ 1331 and 1337. Venue in this district is proper under 28 U.S.C. § 1391, as the defendant transacts business and maintains offices within this district, and a substantial part of the events giving rise to plaintiffs' claims occurred within this district.

PARTIES

3. Plaintiff Confederated Tribes of Siletz Indians of Oregon (Siletz Tribe) is a federally recognized Indian Tribe headquartered in Siletz, Oregon and the successor in interest to the Siletz Tribe Economic Development Commission (hereafter "STEDCO"), which owns an alder sawmill in Toledo, Oregon that was operated as a joint venture in 1996-98.

4. Plaintiff Smokey Point Hardwoods, Inc. (Smokey Point) is a Washington corporation that owned and operated an alder sawmill in Arlington, Washington that closed in 1999.

5. Plaintiff Ross-Simmons Hardwood Lumber C. (Ross-Simmons) is a Washington corporation that owned and oper-

ated an alder manufacturing plant at Longview, Washington and was a 50% owner of a joint venture with the Siletz Tribe in an alder sawmill in Toledo, Oregon.

6. [P.3] Defendant Weyerhaeuser Company is a Washington multinational corporation that is one of the largest wood products companies in the world. Weyerhaeuser owns and operates six alder manufacturing plants in Oregon and Washington through its Northwest Hardwoods Division and operates a seventh alder sawmill in Vancouver, British Columbia through its Canadian subsidiary, Weyerhaeuser Canada Ltd. Weyerhaeuser is by far the largest private holder of forest land in the Pacific Northwest, owning or leasing 9.9 million acres in Oregon, Washington and British Columbia.

RELEVANT PRODUCT MARKETS:

ALDER SAWLOGS AND FINISHED ALDER LUMBER

7. Red alder (alnus rubra) is a tree species that is native to the Pacific Northwest and is the only species of alder that grows to a sufficient size to permit commercial timber production and lumber manufacture. Red alder grows predominantly in the western thirds of Oregon, Washington and British Columbia.

8. The market for alder sawlogs is economically distinct and confined geographically to the Pacific Northwest. Even within the Pacific Northwest including Oregon, Washington and British Columbia, the alder sawlog market is distinct from any other sawlog market. Alder sawlogs are segregated from other species during harvesting in the woods and trucked to production facilities specializing in the production of alder lumber products.

[P. 4] 9. The manufacturing facilities specializing in the manufacture of products from alder sawlogs are all located in the Pacific Northwest. Because of the transportation costs associated with hauling heavy logs, alder sawlogs are generally not manufactured in a sawmill further than 100

miles from the place of timber harvest. Alder sawlogs are susceptible to stain or discoloration within weeks after harvest. Lumber manufactured from stained alder sawlogs sells at a substantial discount to alder lumber without stain. Hence, significant volumes of alder sawlogs are not transshipped long distances to other regions of the U.S. or exported overseas.

10. The market for finished alder lumber, which is defined to include kiln dried and surfaced alder lumber products, is an economically distinct submarket within the larger market for hardwood lumber in the United States.

11. The market for U.S. hardwood lumber breaks down into submarkets based primarily on the characteristics of individual hardwood species in the U.S. Generally, each hardwood species has its own color, grain and workability characteristics and is priced differently from other U.S. hardwood species.

12. The submarket for finished alder lumber is economically distinct from the submarkets for other U.S. hardwoods for several reasons. First, alder has a set of workability characteristics that make it superior to other hardwoods in a number of applications. Second, finished alder lumber has a unique grading system, which includes many more grades than typical for other [P. 5] U.S. hardwoods. This alder-specific lumber grading system demonstrates industry recognition of important differences between alder and other U.S. hardwoods. Third, the pricing for finished alder lumber operates in a manner that is distinct from the pricing for other U.S. hardwoods.

WEYERHAEUSER POSSESSES MONOPOLY POWER IN THE MARKETS FOR ALDER SAWLOGS AND FINISHED ALDER LUMBER

13. As of the fourth quarter of 1995, Weyerhaeuser possessed monopoly power in the market for alder sawlogs, con-

trolling 65% or more of the alder sawlog market. As of December 31, 2001, Weyerhaeuser's share of the alder sawlog market exceeded 75%.

14. As of the fourth quarter of 1995, Weyerhaeuser possessed monopoly power in the market for finished alder lumber, a submarket of the U.S. hardwoods market, controlling 65% or more of the finished alder lumber market. As of December 31, 2001, Weyerhaeuser's share of the market for finished alder lumber exceeded 75%.

1980-2001: WEYERHAEUSER'S WILLFUL ACQUISITION OF MONOPOLY POWER

15. In 1980, a year in which approximately 40 alder sawmills operated in Oregon and Washington, Weyerhaeuser entered the alder lumber market by acquiring Northwest Hardwoods, Inc., which owned and operated alder sawmills in Arlington and Centralia, Washington.

16. In 1985-86, Weyerhaeuser converted one of its softwood sawmills, located in Longview, Washington, into an alder sawmill.

17. During the 1980's, Weyerhaeuser made substantial capital investments in its alder sawmills at Arlington, Centralia and Longview which dramatically increased the manufacturing capacity at each of those facilities.

18. Also during the 1980's, Weyerhaeuser aggressively promoted the proprietary grading system for finished alder lumber developed by Northwest Hardwoods, Inc., which greatly expanded the number of alder lumber products in comparison to the historic grading system. Efficient production of the 10 or more Weyerhaeuser proprietary grades required significant economies of scale.

19. As Weyerhaeuser's marketing of its proprietary grading system gained acceptance in the market, many smaller alder mills throughout the Pacific Northwest closed. The

number of operating alder sawmills dropped from approximately 40 in 1980 to approximately 27 in 1990.

20. In the face of the revolutionary impact of Weyerhaeuser's proprietary grading system on the market for finished alder lumber, some of Weyerhaeuser's remaining competitors attempted to replicate Weyerhaeuser's proprietary grading system in their own facilities in an effort to compete with Weyerhaeuser..

21. In 1995, Weyerhaeuser acquired two of its largest competitors: Goodyear-Nelson Lumber Co. with an alder manufacturing plant at Sedro Woolley, Washington and Diamond [P. 7] Lumber Co.,-with alder sawmills, in Eugene and Garibaldi, Oregon and a chipping and log merchandising facility at Coos Bay, Oregon.

22. With the 1995 acquisitions of Goodyear-Nelson and Diamond Lumber, Weyerhaeuser's share of the markets for alder sawlogs and finished alder lumber exceeded 65%, a level of market power generally recognized as constituting a monopoly.

23. In September, 2000, Weyerhaeuser outbid its competition and acquired Coast Mountain Hardwoods, Inc., the only substantial producer of finished alder lumber in British Columbia and the owner of five forest licenses with the rights to most of the alder harvest on public lands in British Columbia. With this acquisition, Weyerhaeuser's shares of the markets for alder sawlogs and finished alder lumber exceeded 75%.

WEYERHAEUSER'S PREDATORY AND EXCLUSIONARY ACTS AND PRACTICES TO ACQUIRE AND MAINTAIN ITS MONOPOLY

24. During the last two decades, Weyerhaeuser through its Northwest Hardwoods Division has pursued a course of conduct calculated to acquire monopoly power in the markets for alder sawlogs and finished alder lumber. This course of

conduct has included predatory or exclusionary practices as alleged below.

25. To acquire and maintain monopoly control in the market for alder sawlogs, Weyerhaeuser used and continues to use the following exclusionary, anti-competitive practices:

a. Systematic acquisition of competitors to obtain and/or maintain a dominant presence in each of the geographic submarkets for alder sawlogs in Oregon, Washington and British Columbia;

[P. 8] b. Continually increasing capacity at its alder sawmills in the Pacific Northwest, which increased Weyerhaeuser's consumption of alder sawlogs and its share of the sawlog market;

c. Entry into exclusive alder sawlog purchasing agreements with major industrial forest landowners in Oregon and Washington;

d. Entry into exclusive log trading arrangements under which Weyerhaeuser trades certain grades and species of softwood logs to another large industrial forest landowner in Oregon, Washington or British Columbia and receives, in addition to a trade of other softwood logs, a commitment on the part of the other industrial forest landowner to supply its alder sawlogs to Weyerhaeuser alder mills;

e. Requiring the purchasers of Weyerhaeuser timber sales or of parcels of Weyerhaeuser industrial forest land to sign contracts requiring the delivery of alder sawlogs harvested from the involved timber sale or forest land to Weyerhaeuser alder mills;

f. Acquisition of exclusive dealing contracts with the Province of British Columbia under which Weyerhaeuser holds the long-term rights to most of the alder harvested from public lands in British Columbia;

g. Using its dominant position in the alder sawlog market to drive up the prices for alder sawlogs to levels that severely reduced or eliminated the profit margins of Weyerhaeuser's alder sawmill competition;

h. Stockpiling large quantities of alder sawlogs in an effort to deprive competitors of raw materials even though this stockpiling resulted in substantial log degradation and stain which significantly reduced the value of finished lumber products produced from stained logs;

i. Utilizing the practice of communicating to sawlog suppliers in Oregon and Washington that Weyerhaeuser was prepared to exceed the log prices of its competition without regard to any ceiling price and/or insisting on the opportunity to have a "last look" and make the last bid;

[P. 9] j. Using false representations in public testimony before the Oregon State Forester to secure a special exemption from the State of Oregon's log export substitution rules in order to enable Weyerhaeuser to maintain its dominant position in the purchase of alder sawlogs from state forests in Oregon while at the same time exporting softwood logs from its own industrial forest lands in Oregon;

k. In 1997, threatening Grant Wheeler, president of Westwood Industries, then a substantial Northwest Hardwoods' customer, with the termination of that customer relationship in the event Westwood Industries proceeded with plans to build an alder sawmill near Coos Bay, Oregon;

l. Developing and implementing a proprietary log grading system unique to Weyerhaeuser with significant elements of subjectivity and opportunity for manipulation;

m. Successfully pursuing a hostile takeover of Willamette Industries, which added 600,000 acres of forest land including a significant standing alder component in western Oregon to Weyerhaeuser's ownership;

n. Using false representations in public testimony in 1990 before the Office of the Governor of the State of Washington to secure a special exemption from the State of Washington's log exports substitution rules in order to enable Weyerhaeuser to maintain its dominant position in the purchase of alder sawlogs from state forests in Washington while at the same time exporting softwood logs from its own industrial holdings in Washington; and

o. Deviating from its standard practice of transferring alder sawlogs harvested from Weyerhaeuser timberlands to defendant's alder sawmills at market value and instead providing large volumes of alder sawlogs at below market value to defendant's Longview mill to subsidize its effort throughout the second half of the 1990s to drive Ross-Simmons out of business. For the year 2000, if the substantial log subsidy is eliminated and other accounting manipulations are corrected, defendant's Longview sawmill operated at a substantial loss, thereby engaging in predatory pricing against plaintiff Ross-Simmons.

[P. 10] 26. To acquire and maintain monopoly control in the market for finished alder lumber, Weyerhaeuser used and continues to use the following exclusionary, anti-competitive practices:

a. Using vertical integration, specifically through dominance in the alder sawlog market as alleged in paragraph 26;

b. Aggressively promoting finished alder lumber as a distinctive submarket of U.S. hardwoods with greater price stability than other U.S. hardwoods; and

c. Putting financial pressure on its competitors by continuing to increase lumber production and accumulate large volumes of inventory in soft markets, particularly during the period of 1997-2000.

27. The unlawful acts and course of conduct of Weyerhaeuser in monopolizing the markets for alder sawlogs and

finished alder lumber occur in and substantially affect interstate commerce.

SILETZ TRIBE/ROSS-SIMMONS JOINT VENTURE

28. The Confederated Tribes of Siletz Indians of Oregon once owned 1.1 million acres of prime timber and recreational land encompassing a 120-mile-long, 20-mile-wide strip of coastal land constituting over 30% of the Oregon coast. In the second half of the 19th century, between unratified treaties, executive orders and forcible removals, the Siletz Tribe lost most of its aboriginal lands which were contained within the Coast Reservation.

29. In 1956, the Siletz Tribe was terminated by the federal government. Following substantial efforts over many years, Congress in 1977 passed the Siletz Restoration Act, which reinstated the federal government's recognition of the Siletz [P. 11] Tribe as a recognized sovereign tribal nation within the United States.

30. The Siletz Tribe did not regain any parts of its former reservation lands by the 1977 Act. Instead, the Secretary of Interior was-directed to report back to Congress within two years for the creation of a reservation for the Tribe. In 1980, approximately 3,600 acres of public domain timberlands in Lincoln County were transferred to the Siletz Tribe along with 36 acres in the City of Siletz to be utilized for a tribal headquarters, cemetery and other purposes.

31. At the time of the transfer of public lands to the Siletz tribe, the established federal Indian policy was one of promotion Indian tribal self-sufficiency. The government intended for Indian tribes to assume a larger financial responsibility for tribal government operations and programs. The lands transferred to the Siletz Tribe were primarily forest lands. These lands were recognized as sufficient to achieve the government's purpose only if the lands were managed prudently and the revenues from the sale of timber invested in other

profitable ventures. The lands were never intended, in and of themselves, to provide economic self-sufficiency solely from timber sales.

32. Throughout the second half of the 20th century, the majority of the high wage jobs held by Siletz tribal members on the Oregon coast were in the wood products industry. After securing the return of 3,630 acres of aboriginal forest land in Lincoln County, the Siletz Tribe embarked upon a program of [P. 12] managing those forest lands to provide logging jobs for tribal members and to generate funds to assist in the overall effort to secure economic self-sufficiency.

33. In 1994, President Clinton's Northwest Forest Plan dramatically reduced the volume of timber produced from national forests in the Pacific Northwest including the Siuslaw National Forest that encompasses large parts of Lincoln County. One effect of this public policy change was to reduce work opportunities for Siletz tribal members associated with logging in the Siuslaw National Forest.

34. The Siletz Tribe's forest lands include a significant component of alder. A long-term goal of the Siletz Tribe was to move beyond logging and log sales from its forest lands to production of finished lumber and other value added wood products. As part of this effort to produce jobs and greater economic self-sufficiency, the Siletz Tribe entered into a joint venture with Ross-Simmons Hardwood Lumber Co. to convert a softwood sawmill in Toledo, Oregon into an alder sawmill. The Siletz Tribe pursued this effort through its economic development agency, STEDCO.

35. As part of the effort to mitigate the impact on timber dependent communities of massive withdrawals of public land from any commercial timber harvest, the Northwest Forest Plan made available grants and loan monies to enterprises that would manufacture or remanufacture logs available from private lands. The Siletz Tribe invested over $1 million, including grant monies from the federal government,

to purchase a closed sawmill in [P. 13] Toledo, Oregon and then, along with Ross-Simmons, invested substantial additional funds in converting that facility into an alder sawmill to be operated as a joint venture.

36. The Siletz Tribe entered into the joint venture with Ross-Simmons because of that company's reputation, experience and expertise in the manufacture of finished alder lumber. Ross-Simmons had owned and operated an alder sawmill complex at Longview, Washington since 1962, which, until its closure in May, 2001, made it the longest running alder manufacturing plant in the Pacific Northwest.

37. Based upon extensive analysis preceding the decision to enter into the joint venture, the Siletz Tribe and Ross-Simmons believed there was a more than adequate alder lumber supply within a 100-mile radius of Toledo, Oregon to supply the new facility. The Siletz Tribe and Ross-Simmons anticipated that significant alder volume would be generated from Georgia Pacific's adjacent forest lands, a volume that historically had been made available on a competitive bid basis.

38. However, just as the Siletz Tribe/Ross-Simmons Joint Venture was starting up operations in early 1996, Weyerhaeuser entered into an unprecedented exclusive dealing arrangement with Georgia Pacific, which removed most of that company's alder timber from the competitive marketplace.

39. Also in early 1996, Weyerhaeuser's log buyers immediately raised the price for logs in reasonable proximity to Toledo, Oregon by 30% or more, all in an attempt to monopolize the [P. 14] log market in the area and to drive the Siletz Tribe/Ross-Simmons Joint Venture out of business.

40. Weyerhaeuser's tactics severely disrupted the lag supply available to the Siletz Tribe/Ross-Simmons Joint Venture and imposed artificially high log prices on the raw materials that the Joint Venture was successful in securing.

As a result of Weyerhaeuser's predatory and exclusionary behavior, as alleged in paragraphs 25, 26, 38 and 39, the Joint Venture lost money in 1996, 1997 and the first half of 1998 before shutting down in August, 1998.

41. In the second half of 1998, Weyerhaeuser sold approximately 4,200 acres of forest land with significant alder inventory to third parties, all of which was located within a reasonable haul distance of Toledo, Oregon. With the intent to exclude the alder on those lands from the market until 2002 or later, Weyerhaeuser included in all sales transactions a deed restriction limiting the volume of alder harvest on any parcel in any one year and requiring its delivery and sale to Weyerhaeuser's Eugene mill at below market prices. The effect of these restrictions was to virtually guarantee that the alder so restricted would not be harvested by a prudent landowner until the restriction expired in January 2002.

42. The Siletz Tribe's alder sawmill facility has lain idle since its closing in 1998, but has been maintained intact in the hope that market conditions would allow a return to the business of wood products manufacturing. Since the mill's 1998 closure, [P. 15] however, Weyerhaeuser's control of the alder sawlog market within a reasonable haul distance of Toledo, Oregon and its maintenance of artificially high alder sawlog prices from 1998-2001 have made a return to the alder sawmill business by the Siletz Tribe financially infeasible.

43. Between its lost investment, operating losses and loss of reasonably anticipated profits, the Siletz Tribe/Ross-Simmons Joint Venture suffered approximately $6.5 million in damages in 1996-98.

SMOKEY POINT HARDWOODS, INC.

44. In July, 1996, the alder sawmill operated by Smokey Point Hardwoods, Inc. in Arlington, Washington burned to the ground. Efforts to rebuild the plant occurred throughout

parts of 1997 and 1998, but were delayed due to lack of capital.

45. The plant was completed by early 1999 and Smokey Point re-entered the alder log market with the intention of producing finished alder lumber. However, in anticipation of Smokey Point's re-entry into the market, Weyerhaeuser in late 1998 or early 1999 secured an exclusive dealing arrangement with the area's single largest forest landowner, Crown Pacific Ltd. This action removed from open market competition Crown Pacific's significant quarterly alder log production in Whatcom and Skagit Counties and on the Olympic Peninsula.

46. In addition to locking up the raw material available from Crown Pacific, Weyerhaeuser log buyers in Northwest Washington intentionally bid up the price for the remaining alder [P. 16] log production by more than 30% above historic highs, all in an effort to force its competition out of business.

47. The combination of Weyerhaeuser's exclusive dealing arrangement with Crown Pacific, its orchestration of an unprecedented run-up in alder log prices in northwest Washington and its use of other exclusionary practices as alleged in paragraphs 25 and 26 rendered Smokey Point's operation so unprofitable that the mill was shut down in late 1999.

48. Between its lost investment, operating losses and loss of reasonably anticipated profits, Smokey Point suffered damages of approximately $2.6 million.

ROSS-SIMMONS HARDWOOD LUMBER CO.

49. Ross-Simmons Hardwood Lumber Co. owned and operated an alder sawmill complex at Longview, Washington from 1962 to May, 2001, when the facility was permanently closed.

50. Over the course of two decades ending in 2001, Weyerhaeuser pursued a course of conduct designed to force

Ross-Simmons out of business as alleged in paragraphs 25 and 26 above.

51. Weyerhaeuser's predatory and exclusionary conduct over the course of two decades caused Ross-Simmons to suffer significant financial losses and ultimately forced the permanent closure of the mill in May, 2001.

52. Between its lost investment, operating losses and loss of reasonably anticipated profits, Ross-Simmons Hardwood Lumber Co. suffered damages of approximately $27.5 million.

[P. 17] HARM TO COMPETITION

53. Over the last 20 years, Weyerhaeuser's aggressive acquisition of its competition and its intentional use of anti-competitive, exclusionary actions as alleged above have caused a substantial loss of competition in the alder industry, including the loss of plaintiffs' operations.

54. Weyerhaeuser's past behavior shows that sawlog prices will drop significantly once defendant secures complete control of the alder sawlog supply in any regional submarket.

55. Unless checked by a court action, additional competitors of Weyerhaeuser will be forced out of the alder sawmill business, and Weyerhaeuser will be in a position to force sawlog prices down significantly. This will result in substantial losses in the value of standing alder timber on both public and private lands throughout the Pacific Northwest.

56. There is market evidence that Weyerhaeuser's monopoly in the alder industry is already causing industrial and small woodland owners not to plant alder seedlings because of the expectation that alder sawlog prices will fall as Weyerhaeuser gains complete control of the alder manufacturing capacity in the region. This is a loss to the ecosystem as well because alder is native to the region, fast growing, a natural nitrogen fixer and appropriate for certain soil types through-

out the Pacific Northwest, including the standing alder on the Siletz Tribe's forest lands in Lincoln County, Oregon.

[P. 18] II. SECOND CLAIM: ATTEMPTED MONOPOLIZATION.

57. Plaintiffs reallege paragraphs 1 through 56.

58. Weyerhaeuser is attempting to monopolize the markets for alder sawlogs and finished alder lumber through the use of the predatory and exclusionary practices alleged in paragraphs 25 and 26 above.

59. If Weyerhaeuser is allowed to continue the unlawful acts and course of conduct alleged in paragraphs 25 and 26 above, there is a dangerous probability that Weyerhaeuser will successfully secure monopoly power in the markets for alder sawlogs and finished alder lumber.

CONCLUSION

60. The Siletz Tribe, Smokey Point Hardwoods, Ross-Simmons Hardwood Lumber Co. and a declining number of other alder sawmill operators have competed with Weyerhaeuser for the supply of alder sawlogs and the opportunity to manufacture finished alder lumber in the Pacific Northwest.

61. Weyerhaeuser possesses monopoly power, or has a dangerous probability of possessing monopoly power, in the markets for alder sawlogs and finished alder lumber.

62. Weyerhaeuser's conduct, as set out above and in particular in paragraphs 25 and 26, injured plaintiffs. As a direct and proximate result of this illegal anti-competitive conduct, plaintiffs are no longer engaged in the alder sawmill business and suffered substantial lost investment, profits and operating losses.

[P. 19] REQUESTED RELIEF

63. The Siletz Tribe and Ross-Simmons Hardwood Lumber Co. on behalf of the Siletz Tribe/Ross-Simmons Joint Venture seek damages of $6.5 million, which under the federal antitrust laws are trebled to $19.5 million.

64. Smokey Point Hardwoods, Inc. seeks damages of $2.6 million, which under the federal antitrust laws are trebled to $7.8 million.

65. Ross-Simmons Hardwood Lumber Co. seeks damages of $27.5 million, which under the federal antitrust laws are trebled to $82.5 million.

WHEREFORE, plaintiffs pray for judgment on their Sherman Act antitrust claims against Weyerhaeuser for treble damages in the amount of $109.8 million, and for their reasonable attorney's fees and costs.

DATED this 27th day of February, 2003.

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[Stipulated Glossary of Terms (Apr. 1, 2003)]

* * *

The parties to this lawsuit stipulate to the following definitions of terms related to the forest products industry.

I. TERMS RELATED TO FOREST PRODUCTS

Abrasive Planer. A planer that utilizes a sanding belt as opposed to knives to plane the lumber.

Band Saw. A saw consisting of a continuous piece of flexible steel with teeth on one or both sides, used to cut logs into cants and also to rip lumber. Not all manufacturers utilize a band saw to rip lumber.

[P.2] **Barker (also known as a Debarker).** A tool or machine used for removing the bark from logs before the logs are processed.

Bin Sorter. A mechanical system in which lumber is sorted by length, width and/or thickness by dropping or ejecting pieces of lumber into individual bins or compartments.

Board Foot. A basic unit of measurement for lumber. One board foot is equal to a 1 inch board, 12 inches in width and 1 foot in length.

Camp Run. The total log output of a logging operation, unsorted by grade.

Cant. A large slab cut from a log at the head rig usually having one or more rounded edges and designed for further processing by other saws.

Chip. A specified small piece of wood without bark used to make pulp. Chips are generally of a uniform size and are larger and courser than sawdust.

"Come Along" Species. A species within a stand of timber that is typically cut as a consequence of a harvest of a dominant species.

Conifers. Trees that bear cones. Includes most commercial lumber species: Douglas fir, spruce, cedar, pine, hemlock. Also called softwoods and evergreens.

Cruise. A survey of a forest to sample the quantity, size, species, and quality of trees present, as well as to note terrain, soil conditions, drainage, and other data relevant to forest management.

Deciduous. Trees that lose their leaves, usually broadleafed and usually classified as hardwoods.

Deck. The piles where logs are stored in the Log Yard.

"Direct Selling." Selling direct to the end user rather than through an intermediary such as a lumber broker or wholesaler.

Dominant Species. The species that is perceived as having the primary value and volume within a stand of timber.

[P.3] **Douglas Fir.** A softwood found throughout the western United States and Canada, that grows most abundantly in the Pacific Northwest.

Dry Kiln. A chamber in which wood products are seasoned by applying heat and withdrawing moist air.

Edger. A piece of sawmill machinery used to saw slabs or cants, squaring the edges and ripping the cants into lumber.

Face. The side of a piece of lumber showing the better quality or appearance.

Fall Down. A piece of lumber that lacks yield to qualify for finished lumber grading.

Grade. The designation of the quality of a manufactured piece of wood or of logs. Within the hardwood industry, grade is determined by a set of criteria related to appearance of the lumber or log that differentiates between higher and lower quality products.

Grade Yield. The grade mix of lumber that is produced from the process of manufacturing logs into lumber.

Grain. The direction, size, arrangement or appearance or quality of the fibers in wood or lumber.

Green. Freshly sawn or undried lumber.

Green Chain. A moving chain or belt on which green lumber is transported from saws in a mill. The lumber is typically pulled from the chain by workers and stacked according to size, length, species or other criteria.

Hardwood. A term referring to any variety of broad-leafed deciduous tree, and the lumber produced from those trees.

Head Rig. The principal saw in a sawmill in which logs are first cut into cants before being sent on to other saws for further processing.

Indigenous. In wood technology, a species of wood native to a particular area or region.

"KD." Typically referring to kiln-dried lumber which has been seasoned in a kiln to a predetermined moisture content.

[P.4] **Kerf.** The width of a saw cut.

Landing. The place to which logs are yarded or collected for sorting, loading and transportation from the woods.

Log Scaling. The act of measuring log volume.

Log Stacker. A machine used to stack logs in piles.

Log Staining. Discoloration on or in logs caused by decreased internal moisture levels. The potential for staining can be minimized for a time by submerging the logs in water or sprinkling the logs with water. The staining process in logs is slower during the colder winter months and faster in the warmer summer months.

Log Yard. The portion of a sawmill devoted to the storage of logs prior to processing.

Lumber. A wood product of a sawmill.

Lumber Broker. A person who acts as an intermediary between a lumber seller and buyer, usually charging a commission.

Lumber Stacker. A person who stacks lumber in piles. Also used to refer to a machine used to stack lumber in piles.

Lumber Wholesaler. A distributor who purchases lumber from a lumber manufacturer for sale to a lumber retailer, furniture manufacturer, or other end user of the lumber.

MBF. The standard abbreviation for one thousand board feet.

MMBF. The standard abbreviation for one million board feet.

Optimization. Refers to increasing lumber recovery from the log.

Pallet. A wood or metal platform on which material can be stacked to facilitate mechanical handling, moving, and storage.

Pallet Stock. Lumber used to make material-handling pallets.

Per Thousand. Short for per thousand board feet (often abbreviated as MBF), a unit of measurement for timber and finished products.

Planer. A machine used to surface rough lumber using a series of knives.

[P.5] **Proprietary Grades.** Designations of the quality of manufactured lumber as determined by utilizing a particular company's or a particular mill's own set of grading criteria.

Pulpwood. Wood usually converted to chips for manufacturing pulp and paper products.

Raft. Floating assembly of logs bound together for storage or transport by water.

Recovery (also known as Overrun). In the context of the manufacture of lumber, Recovery refers to the measurement of the volume of lumber produced divided by the volume of logs used to produce that lumber. For example, if 1,000 MBF (1 million board feet) of logs are manufactured into 1,500 MBF (1.5 million board feet) of lumber, the Recovery is 1.5 (1,500 MBF lumber divided by 1,000 MBF logs).

Red Alder. A deciduous tree that grows in Alaska, California, Coastal Canada, Idaho, Oregon, and Washington. Different species of alder besides red alder exist in other parts of the world.

Rip / Ripping. To cut a board on two sides to remove imperfections, which could include wane, splits or knots.

Round Saw. A circular piece of flexible steel with a series of teeth used to rip lumber.

S2S. Lumber that has been planed to provide two smooth sides.

Sander. A machine designed to smooth wood and remove saw and lathe marks and other imperfections.

Scale. A measure of the volume of wood in a log or logs, usually expressed in board feet.

Scribner. A measure of volume of potential board feet in logs, usually expressed in board feet.

Seasoning. Removing moisture from green wood to improve its manufacturing serviceability.

Shook. See Pallet Stock.

Softwood. A general term referred to any variety of trees having narrow needle-like leaves, generally conifers.

[P.6] **Sorter.** A mechanical device that sorts lumber for thickness, width or length by dropping or ejecting pieces of lumber into separate compartments.

"Square Up." To cut lumber at a ninety degree angle creating square edges.

Stand. An identifiable group or trees or a section of timber occurring in a particular area.

Standing Timber. Trees that have not been cut.

Sticker. A narrow strip of wood placed between layers of lumber to help air circulate in drying the lumber either in a kiln or by air seasoning.

Stumpage. Standing timber.

Transfer Price. The price at which intra-company trades are consummated.

Trim. The amount of extra length allowed when bucking logs or sawing green lumber to compensate for end checking and damage in transit, and for "squaring up" in the mill.

Trim Saw. A piece of equipment used to "square up" the edges of the lumber.

"Thick and Thin." Lumber which is cut to a thickness that does not meet the required specifications.

Veneer. A thin sheet of wood, rotary cut, sliced or sawed from logs and used as interior ply or decorative face.

Wane. Bark or lack of wood on the edge or corner of a piece of lumber.

Yarder. A machine used to bring logs from the cutting area to the landing.

* * *

[Stipulated Facts (Apr. 1, 2003)]

* * *

The parties to this lawsuit stipulate to the following facts.

Parties

1. Plaintiff Ross-Simmons Hardwood Lumber Co. ("Ross-Simmons") is a Washington corporation that owned and operated a hardwood manufacturing facility in Longview, Washington from 1962 through May 2001.

2. Plaintiff Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe") is a federally recognized Indian tribe headquartered in Siletz, Oregon. The Siletz Tribe is the successor in interest to the Siletz Tribe Economic Development Commission ("STEDCO") which [P. 2] owned a softwood sawmill in Toledo, Oregon ("the Toledo mill") that was converted to manufacture hardwood lumber in late 1995.

3. Defendant Weyerhaeuser Company is a Washington corporation. It was founded in the Pacific Northwest in 1900 by Frederick Weyerhaeuser and is headquartered in Washington state. Weyerhaeuser's business known as "Northwest Hardwoods" is one of the largest manufacturers of hardwood lumber in the world.

4. Through its Northwest Hardwoods business, Weyerhaeuser currently owns and operates thirteen hardwood sawmills in nine states and British Columbia, Canada, including seven hardwood sawmills in Oregon, Washington, and British Columbia.

Hardwoods Compared to Softwoods

5. There is a difference between hardwood trees and softwood trees. Hardwoods are one of the botanical groups of trees with broad leaves that fall during the autumn and winter months. Softwoods, also known as conifers, have needlelike leaves that do not fall on a seasonal basis. Pine

trees are an example of a softwood and maple trees are an example of hardwood.

6. Hardwood logs are converted by mills into hardwood lumber, chips, and other products. Softwood logs are converted by mills into softwood lumber, chips, and other products.

7. Throughout the United States, there are several species of hardwoods manufactured into lumber including (in alphabetical order): alder, aspen, basswood, beech, black walnut, cherry, cottonwood, hard maple, hickory, gum, red elm, red oak, soft maple, tulipwood, walnut, white oak, willow, and yellow birch.

8. Hardwood lumber manufactured in the United States is sold throughout the United States and also throughout the world for international consumption. Hardwood lumber manufactured internationally is also imported into the United States for domestic consumption.

9. Hardwood lumber can be used for a variety of end uses, including pallets, furniture, cabinetry, millwork, molding, and specialty wood products including picture frames, paint brush handles, and musical instruments.

[P. 3] **Hardwood Lumber Production in the Pacific Northwest**

10. In the Pacific Northwest, there is production of the following types of hardwood lumber, including: red alder, maple, birch, and oak.

11. Red alder is the predominant type of hardwood lumber produced in the Pacific Northwest.

12. During harvest in the Pacific Northwest, hardwood logs, including alder, maple, and others, are typically sorted from softwood species and then trucked to facilities specializing in the production of hardwood lumber, chips, and other products.

13. Weyerhaeuser's hardwood mills in the Pacific Northwest are designed to process hardwood logs into lumber, chips, and other products. During the parties' years of operation, Ross-Simmons, STEDCO and Weyerhaeuser's processing of alder logs took place only in the Pacific Northwest.

14. Red alder trees are typically, but not always, harvested within 100 miles of the sawmill in which it is processed into hardwood lumber, chips, and other products.

15. On an annual basis since 1995, less than 1% of the alder sawlog harvest in the Pacific Northwest has been exported for international consumption and processing.

Operational History of Ross-Simmons

16. Prior to its shutdown in May 2001, a sawmill had operated at the Ross-Simmons industrial site since 1948. Ross-Simmons began operation as a company in 1962 following the purchase of L.R. Smith Lumber Company by the Ross and Simmons families, who owned Ross-Simmons on a 50-50 basis.

17. As reported in its financial statements, Ross-Simmons Hardwood Lumber Company's lumber sales (MBF), revenues, net worth, pretax income, taxes, and net income after tax for the period of 1967 through December 31, 2001, are listed below:

[P. 4] Ross-Simmons Hardwood Lumber Company

Fiscal Year	Lumber Sold (MBF)	Revenue	Net Worth	Pretex Income	Tax	Net Income After Tax
Yr. Ended 2/29/1967	13,069	$1,524,529	$382,765	unavail.	unavail.	$123,346
Yr. Ended 2/29/1968	10,046	1,310,502	445,736	$103,934	$39,000	64,934
Eleven Months Ended 1/31/1969	10,779	1,594,285	535,044	161,741	72,396	89,345
Eleven Months Ended 12/31/1970	8,997	1,782,155	712,881	205,682	92,557	113,125
Twelve Months Ended 1/31/1971	9,921	1,946,552	678,027	228,693	102,911	125,782
Yr. Ended 1/31/1972	12,212	2,477,473	809,418	287,052	125,661	161,391
Yr. Ended 1/31/1973	13,371	2,944,227	958,801	271,172	121,789	149,383
Yr. Ended 1/31/1974	13,735	3,677,373	1,032,029	287,628	0	287,628
Yr. Ended 1/31/1975	11,276	4,517,469	1,233,113	381,482	0	381,482
Yr. Ended 1/31/1976	12,278	5,529,110	952,718	201,087	0	201,087
Yr. Ended 1/31/1977	12,950	6,457,302	1,060,690	257,972	0	257,972
Yr. Ended 1/31/1978	13,128	6,916,801	996,862	49,144	5,000	44,144
Yr. Ended 1/31/1979	13,908	8,213,076	1,254,900	408,038	150,000	258,038
Yr. Ended 1/31/1980	12,722	8,816,925	1,370,519	136,888	21,269	115,619
Yr. Ended 1/31/1981	9,167	7,805,996	1,712,710	548,186	205,995	342,191
Yr. Ended 1/31/1982	9,020	6,997,693	1,663,585	-94,925	-45,800	-49,125
Yr. Ended 1/31/1983	7,657	7,942,699	1,764,302	148,647	37,236	111,411
Yr. Ended 1/31/1984	13,212	9,622,115	654,957	18,251	-7,404	25,655
Yr. Ended 1/31/1985	21,987	14,447,464	748,416	72,459	-21,000	93,459
Yr. Ended 1/31/1986	18,449	11,882,292	405,814	-373,746	31,144	-342,602

Fiscal Year	Lumber Sold (MBF)	Revenue	Net Worth	Pretex Income	Tax	Net Income After Tax
Yr. Ended 1/31/1987	26,066	15,029,315	388,181	277,263	0	277,263
Yr. Ended 1/31/1988	24,642	16,282,049	527,297	191,844	0	191,844
Yr. Ended 1/31/1989	27,855	18,592,946	804,669	630,875	196,161	434,714
Yr. Ended 1/31/1990	29,953	18,832,086	1,486,295	965,409	246,100	719,309
Eleven Months Ended 12/31/1990	27,025	14,993,132	1,591,216	132,421	27,500	104,921
Yr. Ended 12/31/1991	30,278	19,923,711	2,175,274	903,727	319,669	584,058
Yr. Ended 12/31/1992	35,920	21,111,506	2,560,112	586,481	201,641	384,840
Yr. Ended 12/31/1993	40,044	24,209,115	3,772,241	2,110,928	738,799	1,372,129
Yr. Ended 12/31/1994	45,949	28,789,198	3,996,701	1,142,742	478,282	664,460
Yr. Ended 12/31/1995	52,723	36,897,685	5,735,019	2,584,545	822,227	1,762,318
Yr. Ended 12/31/1996	58,607	38,193,330	5,978,690	604,603	132,782	471,821
Consolidated 12/31/1997	47,064	37,204,420	6,816,977	1,287,880	449,593	838,287
Consolidated 12/31/1998	36,380	23,623,180	4,604,892	-2,212,085	0	-2,212,085
Consolidated 12/31/1999	37,644	23,664,950	1,098,687	-1,333,982	0	-1,333,982
Yr. Ended 12/31/2000	34,000	22,479,138	172,676	-926,009	0	-926,009

[P. 5] 18. In 1997, Ross-Simmons borrowed approximately $1.5 million to pay legal expenses related to the estate of Mr. Sidney Simmons and to fund the buyout of some of the Simmons family, which resulted in John Simmons becoming the 100% owner of Ross-Simmons either directly or through a trust. John Simmons signed a promissory note to the company for approximately $1.5 million. In 1999, Ross-Simmons cancelled that promissory note owed by John Simmons to Ross-Simmons.

19. In 1996, the Ross-Simmons' payroll was $6.3 million. In 2000, Ross-Simmons employed 170 workers in Cowlitz County. Northwest Hardwoods' Longview mill employed 187 workers in Cowlitz County.

20. Ross-Simmons shut down permanently in May 2001.

21. Much of Ross-Simmons' equipment was sold at auction on September 20, 2001. The auction generated net proceeds of $469,408. As of November 1, 2001, Ross-Simmons owed U.S. Bank approximately $2.25 million. As of August 31, 2001, Ross-Simmons owed unsecured creditors a total of $1,795,120. Ross-Simmons still owns the industrial site on which its mill was located.

22. In approximately September 1999, Global Ventures, a consulting firm, was hired by Ross-Simmons to help with their operations or to locate a possible buyer. Global Ventures was involved with Ross-Simmons until its closure in May 2001.

23. In 1999, Ross-Simmons had discussions with Washington Alder LLC about the possibility of merging with that company and jointly participating in the acquisition of Coast Mountain Hardwoods. Although such a transaction was never completed, that was not because of anything done by Weyerhaeuser.

Operational History of Ross-Simmons/ STEDCO Joint Venture

24. In August 1995, the Siletz Tribe and Ross-Simmons began negotiations relating to the formation of a joint venture to operate a hardwood sawmill on land owned by the Siletz Tribe [P. 6] in Toledo, Oregon. A Joint Venture Agreement between Ross-Simmons and STEDCO, the economic development arm of the Siletz Tribe, was signed in November 1995.

25. The Joint Venture Agreement, which had an initial term of five years, included provisions for division of profits and for termination of the agreement.

26. The Joint Venture was terminated in September 1998.

27. The Siletz Tribe owns the assets previously owned by STEDCO, which has been dissolved. The Siletz Tribe has not operated the facility as a sawmill since the Joint Venture shut down in August 1998.

Operational History of Northwest Hardwoods

28. Northwest Hardwoods, headquartered in Portland, began operations in 1967. In 1980, Northwest Hardwoods became part of Weyerhaeuser Company. As a business of Weyerhaeuser, Northwest Hardwoods has retained its name and general management structure.

29. Northwest Hardwoods currently operates thirteen hardwood sawmills in nine states or provinces in two countries. At its mills, Northwest Hardwoods produces over fifteen types of hardwood lumber, including red oak, elm, white oak, soft maple, cherry, ash, yellow poplar, red alder, pacific coast maple, pacific coast birch, cottonwood, basswood, hickory, and walnut.

30. Northwest Hardwoods operates five sales offices in the United States, including offices in: Portland, Oregon; Titusville, Pennsylvania; Federal Way, Washington; Dor-

chester, Wisconsin; and Little Rock, Arkansas. Northwest Hardwoods operates other sales offices in Europe and Asia.

31. The Northwest Hardwoods hardwood sawmills in the Pacific Northwest are located in: Delta, British Columbia; Sedro Woolley, Washington; Arlington, Washington; Centralia, Washington; Longview, Washington; Garibaldi, Oregon; and Eugene, Oregon.

32. In 1980, Weyerhaeuser acquired Northwest Hardwoods, Inc., which then owned and operated hardwood sawmills in Arlington and Centralia, Washington.

[P. 7] 33. In 1985-86, Weyerhaeuser converted a softwood sawmill that it owned in Longview to manufacture hardwood lumber.

34. As of the date of its initial production of hardwood lumber in 1986, Weyerhaeuser had invested approximately $3.1 million in conversion and other related improvements at its Longview sawmill.

35. In 1995, Weyerhaeuser purchased three hardwood sawmills from two of its competitors: Goodyear-Nelson Lumber Company and Diamond Lumber Company. At the time of these acquisitions, Goodyear-Nelson was operating a hardwood sawmill in Sedro Woolley, Washington, and Diamond Lumber Company was operating hardwood sawmills in both Eugene and Garibaldi, Oregon.

36. In September 2000, Weyerhaeuser acquired Coast Mountain Hardwoods, Ltd., a hardwood sawmill located in Delta, British Columbia. With the acquisition, Weyerhaeuser acquired five forest licenses with rights to a portion of the alder and other hardwoods harvested from a portion of provincial forest lands in British Columbia. The five forest licenses cover the Fraser, Sunshine Coast, Kingcome, Strathcona and Arrowsmith timber supply areas in British Columbia. Four of the forest licenses have original terms of 15 years; one (Fraser) has an original term of 20 years.

These licenses expire on: January 1, 2009; July 4, 2011; December 31, 2011; August 8, 2011; and May 24, 2011, respectively.

37. Weyerhaeuser refers to the Coast Mountain facility as its Delta sawmill. Delta is a town just south of Vancouver, British Columbia.

38. During the late 1960s and early 1970s, Northwest Hardwoods began developing a proprietary grading system for its finished alder lumber products.

39. From 1995 through 2001, Northwest Hardwoods produced less than 5% of the total volume of hardwood lumber produced in the United States.

[P. 8] 40. Weyerhaeuser operates a business called "Western Timberlands" which manages timberlands owned by Weyerhaeuser in the Pacific Northwest. Weyerhaeuser supplies hardwood logs from these company-owned timberlands to its hardwood sawmills in the Pacific Northwest.

41. From 1990 through 2000, Weyerhaeuser made the following capital investments in its hardwood sawmills in the Pacific Northwest:

Year	Arlington	Centralia	Eugene	Garibaldi	Sedro W	Longview
1990	$ 914,552	$ 471,352				$ 1,247,718
1991	345,900	333,777				653,309
1992	673,021	432,271				191,201
1993	632,160	1,164,352				747,648
1994	1,678,979	2,415,332				1,115,282
1995	844,678	3,751,960	$ 125,840		$ 802,188	3,296,928
1996	6,783,821	2,113,539	6,026,647	$1,252,421	1,094,057	2,779,401
1997	898,488	3,082,295	3,810,091	2,583,592	2,909,876	2,790,965
1998	677,483	1,142,563	619,071	768,149	2,979,861	1,626,220
1999	834,052	1,115,750	2,511,777	17,504	1,229,349	2,012,708
2000	387,609	227,590	508,031	31,750	251,933	1,260,162

42. For the period of 1990 through 2001, the annual lumber production in thousand board feet (MBF) at Weyerhaeuser's hardwood sawmills in the Pacific Northwest is set out below:

Year	Arlington	Centralia	Eugene	Garibaldi	Sedro W	Longview	Delta	Total
1990	48,622	46,342				54,876		149,840
1991	48,288	47,633				57,333		153,254
1992	50,627	53,337				61,853		165,817
1993	51,765	54,765				67,428		173,958
1994	57,526	55,298				68,645		181,469
1995	57,416	58,178	12,754	4,873	12,316	76,158		221,695
1996	55,552	59,519	51,558	20,858	19,105	61,252		267,844
1997	59,403	58,205	51,865	24,925	22,696	55,863		272,957
1998	53,178	54,836	52,527	31,356	24,291	45,362		261,550
1999	54,881	62,234	58,843	35,578	27,771	53,742		293,049
2000	54,325	59,221	63,647	33,290	33,167	55,383		308,645
2001	52,082	57,963	61,899	27,988	31,346	55,185	40,150	326,613

43. In 1996, Georgia-Pacific sold 4.16 million board feet of hardwood logs to Weyerhaeuser's Eugene mill, which accounted for 12% of the annual log consumption of that mill.

[P. 9] 44. In 1997, Georgia-Pacific sold 2.66 million board feet of hardwood logs to Weyerhaeuser's Eugene sawmill, which accounted for 7% of the annual log consumption of that mill.

45. In 1998 and 1999, Weyerhaeuser and Georgia-Pacific entered into one-year log contracts under which Weyerhaeuser agreed to sell softwood pulplogs to G-P's pulp mill in Bellingham, Washington and G-P agreed to sell hardwood sawlogs to Weyerhaeuser's Eugene and Garibaldi sawmills.

46. In 1998, Georgia-Pacific sold 3.2 million board feet of hardwood logs to Weyerhaeuser's Eugene sawmill, which accounted for 9% of the annual log consumption of that mill. A portion of these sales was subject to the log purchase agreement described in paragraph 47.

47. In 1999, Georgia-Pacific sold 5.03 million board feet of hardwood logs to Weyerhaeuser's Eugene sawmill, which accounted for 13% of the annual log consumption. A portion of these sales was subject to the log purchase agreement described in paragraph 47.

48. In 1995, Weyerhaeuser acquired approximately 9,500 acres of forest land in Oregon as part of its acquisition of Diamond Wood Products.

49. During 1997 through 1999, Weyerhaeuser sold the 9,500 acres acquired as part of the agreement with Diamond Wood Products to a number of different individuals and entities. On sales of approximately 4,200 acres, beginning in December 1998, the parties to the individual agreements committed that Northwest Hardwoods would have, for a period of three years, a right of first refusal to any sale of hardwood logs originating from these lands.

50. Westwood Lumber Company opened a hardwood sawmill in 1998 near Reedsport, Oregon. Construction on this sawmill began in 1997, and the mill began purchasing hardwood sawlogs in 1998.

[P. 10] 51. Washington Alder LLC is a hardwood sawmill located in Mt. Vernon, Washington. It began purchasing hardwood logs in late 1998 and producing hardwood lumber in early 1999.

DATED this 1st day of April, 2003

Respectfully submitted,

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EXCERPTS OF RELEVANT TRIAL TESTIMONY IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (PORTLAND)

[Vol. 1-A (Apr. 8, 2003)] [Plaintiffs' Opening Argument]

* * *

[Tr. 58] 1980 to 2001, as falling into three different time periods. That's how I think – that's a helpful way to examine the evidence from both sides that you will hear in this case.

Now, what are those three time periods? I told you that Weyerhaeuser went from 0 to 75-plus in this time frame, but let's break it down so you understand some of the key building blocks to their monopoly position.

The first time period is 1980 to 1994. That's a time that I'll describe in more detail in a bit where the competitive landscape of the alder industry was relatively healthy.

Weyerhaeuser was getting a lot bigger, but Ross-Simmons and another company in Oregon called Diamond Lumber were strong competitors and No. 2 and No. 3, Diamond No. 2 and Ross-Simmons No. 3 in terms of production, profitability, good, strong players. And the industry had a good number of competitors and no one firm, Weyerhaeuser included, had a dominant share of the market.

1995 is the second time frame. In 1995 we have a watershed year. That is the year that Weyerhaeuser bought two of its larger competitors, one in Washington with a mill in Sedro Woolley; and they bought the No. 2 in the industry, Diamond Lumber, with alder sawmills in Garibaldi as well as Eugene. The No. 2 in the industry in terms of production.

Then the third time frame is 1996 to 2001. The [Tr. 59] important thing about '95 is this is where Weyerhaeuser grew to six sawmills with the kind of regional spread from north to south in Oregon and Washington and gained the kind of market share, 75 percent in lumber, that they now had the power to really exert influence, strong influence, power, over the log and lumber markets.

This is the time when we see some of the worst of the anticompetitive activity, not that they hadn't engaged in some before. The log hoarding incidents were worse in '89 and '93. But in '96 to '01 is when they had the kind of market power with the kind of market share that would be able to be brought to bear on the log market in a way that killed my two clients.

Now, let me go through each of these three time frames in more detail. First, 1980 to 1994. This is when Weyerhaeuser entered the sawmill market, buying Northwest Hardwoods with two alder sawmills in Centralia and Arlington.

They tried to buy some others, including to try to buy Ross-Simmons in 1983. John Simmons and his family were able to block that deal. And what did Weyerhaeuser do, within two years after losing that deal to buy Ross-Simmons, they converted a softwood sawmill in Longview, right down the street literally, literally a stone's throw from Ross-Simmons.

* * *

[Vol. 1-B (Apr. 8, 2003)] [Testimony of William Nelson]

* * *

[Tr. 81] A. We were an alder, we cut products from four to eight inches, from four quarter to eight quarter, plus pallet.

Q. And the finished lumber that you referred to, was that kiln dried?

A. Yes, all kiln dried.

Q. Could you briefly describe the facilities that were in place at Ross-Simmons Longview mill.

A. We put a double cut Salem band mill and we put in a Ukiah thin saw edger, and we put in a thin saw board edger. We had barkers, chippers. When I took over, we had a canter already in to cant logs.

Q. Now, during the 1990s, how many shifts were operating at the Longview Ross-Simmons mill?

A. We operated two shifts.

Q. Approximately how many employees?

A. About 165, 168.

MR. HAGLUND: Now, may I be handed Exhibits 2 and 3.

THE COURT: Is that all the exhibits you want or did you give us the list?

MR. HAGLUND: I've got the list right here.

THE COURT: Let's give it to my clerk and he'll have them ready for you.

MR. HAGLUND: Thank you.

BY MR. HAGLUND:

[Tr. 82] Q. Mr. Nelson, this is Exhibit 2. Do you recognize this aerial photograph?

A. Yes, I do.

Q. Could you describe what can be seen in this photo?

A. This part right here is our log yard, Ross-Simmons log yard. This area right here is our mill area.

Q. We see several buildings in the mill area. What would they consist of?

A. There is a storage shed, dry kilns, series of dry

kilns, planer building and sawmill in this area.

Q. That's in the separately-marked area to the –

A. Pardon me?

Q. That's in the separately outlined area adjacent to the log yard?

A. The sawmill is right there.

Q. Okay. And how many acres in this industrial site altogether?

A. 26.3 or something like that.

Q. Now, I'd like to put Exhibit 3 on the screen. This is a slightly higher view. Can you see the Ross-Simmons mill in this aerial photograph?

A. Yes, I do.

Q. Would you outline the Ross-Simmons facility?

A. (The witness complies.)

That's the general area of it.

[Tr. 83] Q. Okay. And that includes the same log yard and sawmill

that you showed on the other photograph?

A. Yes, it does.

Q. Now, can – can you also point out where the Northwest Hardwoods Longview mill is located?

A. (The witness complies.)

That surrounds it.

Q. And is there a street on which both companies were located?

A. Yes. Industrial Way goes right down here.

Q. Now, would log trucks – where was your office for the sawmill at Ross-Simmons?

A. Approximately right there at the end of that little line, that black spot.

Q. Okay. And is that office right on Industrial Way?

A. Yes, it is.

Q. If log trucks were to deliver logs to the Northwest Hardwoods mill there in Longview would they have to travel along Industrial Way?

A. That's correct.

Q. Was it a regular practice to observe those trucks going by at Ross-Simmons?

A. Yes, it was.

Q. And could you point out the Northwest Hardwoods log yard?

[Tr. 84] A. (The witness complies.)

Q. Okay. What body of water is it that we see in this aerial?

A. That's a mill pond on the lower side that used to be the International Paper log pond. This one here is the Cowlitz River.

Q. Okay. And both of these companies are in the City of Longview?

A. Yes, they are.

Q. I'd like to ask a few general questions about your experience in the hardwood industry and sawmilling generally. When it comes to a sawmill, Mr. Nelson, what is the largest cost?

A. Logs.

Q. Could you give the judge and jury some sense of where it will range in terms of percentage total cost of a sawmill?

A. Depending on what type of logs you buy, from 60 to 75 percent of your total cost is log cost.

Q. Now, in your experience, Mr. Nelson, what would you identify as the keys to success in the sawmill business?

A. Well, there's quite a bit of things. You've got to have good equipment that can cut it. You got to have a good crew and good management and a good program for selling your wood.

[Tr. 85] Q. Where does the resource fit in the keys to success?

A. Well, you have to have that or you don't have a sawmill. That's the number one thing.

Q. Logs is number one, in your opinion?

A. Yes, it is.

Q. Now, what type of success did Ross-Simmons experience in the first several years after you took over as general manager?

A. We had very good profits and we continued to raise production.

Q. Did you increase production in the period of '93 through '95?

A. Yes, we did.

Q. How did – how was accomplished? Did you make improvements in the mill?

A. Yes. We made some improvements. We moved the trim saw, we moved the bunkers. We put unscramblers in. We changed the green chain on our pallet and we put in a shook machines which takes in lineal pallet, cuts it into short links for pallet stock.

Q. Do you recall setting any types of production goals after you took over as general manager in '93?

A. Yes. I think we cut about 36 million, was the biggest we cut. And the first meeting I had with the management, we set a goal to cut 50 million within two years.

[Tr. 86] Q. When you say "50 million," are you referring to 50 million board feet of total production?

A. Yes. 50 million board feet total production, pallet and shop lumber.

Q. Was Ross-Simmons able to achieve that goal?

A. I think that in three years we hit over 50 million twice.

Q. As you'll recall, in the mid-'90s, where would that have placed Ross-Simmons in terms of a company behind Northwest Hardwoods in terms of total production?

A. Probably second. Third, if you want to count Diamond. I think of Washington in my market, so we were probably third behind Diamond.

Q. So before Weyerhaeuser bought Diamond, if it's two mills in Oregon in '93, '94, you would have been number two?

A. Number two, yes.

Q. I mean number three.

A. Number three counting Diamond, an Oregon mill.

Q. Okay. In 1995, you had over 50 million board feet?

A. Yes.

Q. And do you recall when Northwest Hardwoods or Weyerhaeuser purchased Diamond?

A. In '95, September of '95.

Q. So as you ended 1995, what position in terms of total production would Ross-Simmons have been in relative to the [Tr. 87] industry?

A. I think we would have been in second place at that time.

Q. Okay. Now, as you entered the year 1995 and then into 1996, did the company have expansion plans?

A. Yes, we did.

Q. Could you describe those.

A. In '95, we wanted to expand and put in a small 17-inch barker and another cut-off saw to handle smaller logs for our canter side.

Q. Did the company also secure additional facilities in terms of kiln drying and planing?

A. Yes. In early '95 we were shipping – actually, '94 and the early part of '95, we were shipping lumber to Oregon to be dried, and we started looking around for dry kilns because we could not dry our capacity that we were advancing to in the Longview area.

At that time, we took on Ridgefield, Port of Ridgefield had dry kilns they wanted to lease out and we took those on to handle our expansion.

Q. And how far was that from your Longview mill?

A. Probably 35 – 37 miles, I think.

Q. So how many kilns there?

A. There was seven down there is what I recollect.

Q. And you leased them?

* * *

[Tr. 95] Venture with the tribe?

A. Yes. I spent about two weeks down there.

Q. And what conclusions did you come to regarding the available log supply for the Toledo operation you were contemplating with the tribe?

A. That there was quite a bit of available timber in the area. All this isn't tributary to that area, but there's quite a bit there.

Q. Okay. Now, at the time that you were in these negotiations, who was the major competition in Oregon for that Toledo mill?

A. Diamond Lumber Company in Eugene.

Q. When did you learn that Weyerhaeuser had announced that it was buying Diamond?

A. Some time in the latter part of September of '95.

Q. Was that before you signed your agreement for the Joint

Venture?

A. Yes, it was.

Q. Why did you proceed with the Joint Venture after learning that Weyerhaeuser had bought Diamond Lumber?

A. There's several reasons. One, we had an agreement with GP verbally to exchange logs for chips, and the volume

of logs that they produced a day was eight to thirteen of the eight and up logs that we needed for our mill, and that would just about make one shift of what this mill would cut.

[Tr. 96] We were 125 miles from Eugene, so we're quite a ways out of the range of Eugene, and besides that a lot of timber is beyond us so we'd be more than that. And –

Q. Let me stop you right there because I think you said one thing a little too quick. You said there was eight to thirteen. What did you mean?

A. GP produced eight to thirteen loads of eight and up logs per day.

Q. Okay. So eight to thirteen log truckloads?

A. Yes.

Q. And what was the diameter?

A. Eight inch and up, what they call saw logs, what Diamond calls saw logs.

Q. And what type of – was there any particular type of alder saw log that Toledo mill was going to be offering?

A. It worked best on ten and up, but eight and up was where we were going to operate.

Q. So at the point where you signed the Joint Venture, did you think you had a deal with Georgia Pacific?

A. Yes, I did.

Q. Did you learn later that there was not going to be a deal?

A. That's right.

Q. What did you learn was actually going to happen with the Georgia Pacific volume?

[Tr. 97] A. We went down, the guy that worked for us at the mill went down and met with the GP guy, Larry Bray, to

form up a contract, and he said that he had traded the logs to Weyerhaeuser for fir – they were going to go to the Diamond mill, which was a Weyerhaeuser mill, in exchange for fir logs from Weyerhaeuser land to go to there Philomath fir sawmill.

Q. So before the Joint Venture started, the Georgia Pacific volume became unavailable?

A. That's correct.

Q. Now, just a quick question regarding some of your terminology. What is a saw log, an alder saw log?

A. It's anything eight and up.

Q. Eight inches in diameter and up?

A. Yes. You can grade them for quality, but it's an eight and up log.

Q. Okay. And this is a fresh sawn log that hasn't stained?

A. Yes, that's correct.

Q. And the eight inches you're referring to the small end diameter?

A. That's correct.

Q. Okay. Now, had that Georgia Pacific contract actually gotten written up and signed, what – what portion of the Toledo Joint Venture's annual needs would it have covered?

* * *

[Tr. 102] A. No.

Q. So at Toledo, the logs would be sawn and it would produce green lumber?

A. Yes.

Q. And where did the green lumber then go to be dried and surfaced?

A. We'd haul the green lumber up to our Ridgefield plant where we dried Ross-Simmons lumber.

Q. And at Ridgefield, what facilities did you have besides the kilns?

A. I think we had about eight or nine dry kilns and a planer and a sticker stacker to stack the lumber for dry kilning.

Q. Now, some of the little detail regarding some of these little pieces of equipment we'll leave for you to cover when you narrate a film which is one of our exhibits. I think it will be easier to understand when the Court and jury can actually see the equipment operational.

I'd like to turn now to some questions about what actually happened in the log market in and around Toledo when you started up. You started in early 1996?

A. Yes.

Q. When did you start buying logs, to the best of your recollection?

A. Actually, we were out trying to buy logs in November [Tr. 103] and December.

Q. You'd lost the Georgia Pacific contract?

A. Yeah.

Q. So what do you recall happening in the log market in and around Toledo in that first year of operations?

A. When I originally went down there in the early part of the year to investigate the timber supply down there, log prices were 250 to $400 a thousand. When we started buying logs, they adjusted to 400 to $550 a thousand for the same logs.

Q. So they went up 100, 150 bucks?

A. Yes, they did.

Q. And when you say, "$400 a thousand," you're using the shorthand that's heard in the industry. A thousand means per thousand board feet?

A. A thousand board feet, yes.

Q. Okay. And what did you observe in the year 1997?

A. The price stayed up high continually.

Q. Did you, based on your observations in the market, what was the reason, in your opinion, that the log market went up so much in 1996?

A. Northwest pushing the price high. We don't know why they pushed it high.

Q. When you say, "Northwest," are you referring to Weyerhaeuser?

[Tr. 104] A. Weyerhaeuser's Diamond mill.

Q. Did the same condition persist then in 1997?

A. Yes.

Q. What problems did these high log costs cause for the Toledo Joint Venture, in your experience, in '96 and in '97?

A. We couldn't get a high enough quality log to run the mill. We started cutting a lot of smaller logs, paid too much for them just to get them to have something to run through the mill. We were cutting off smaller, less quality logs at a higher price.

Q. Backing up a second, in terms of the number of shifts that were you going to run at Toledo, what was your plan for '96?

A. In '96, the latter half, we hoped to get to two shifts. We never did get to two shifts in that year.

Q. In 1997, did you have plans to go to two shifts originally?

A. Yes, we did.

Q. So at worse you thought you would get up to two shifts at the beginning of '97?

A. At the latest, yes.

Q. Okay. That was the plan originally before you entered into the Joint Venture?

A. Yes, it was.

Q. Okay. How many employees per shift approximately?

* * *

[Tr. 106] doing in Longview to match the market that we had.

Q. Let me ask you some specifics about that. You said the market fell off in 1998. Are you referring to the log or the lumber market?

A. The lumber market.

Q. So the lumber market fell off in terms of the price you were getting for lumber?

A. Yes. And we couldn't sell as much as we were selling before, so we switched to four days.

Q. What do you remember was the reason that the lumber market fell off?

A. Well, everything. The Asian flu, as it's been called here in you guys' summations, but the market in Asia went bad, the market in Europe backed off. We backed off to try to match what we could sell.

Q. You did observe then a down turn in the alder lumber market that was partly caused by this Asian economic crisis in late '97 –

A. Yes, sir.

Q. – and into '98?

A. It actually started in late '97 for us.

Q. Okay. And you mentioned a couple of things, but you did it so quickly I am not sure it was understood. What actions did Ross-Simmons take at its Longview mill to deal with that situation?

[Tr. 107] A. We curtailed to four days a week.

Q. Can you keep your crews to four days a week in tough times?

A. First we curtailed to four nines, which is 36 hours. Then we went to four eights.

Q. Did you take any steps to change the situation in Toledo in '98?

A. Yes. We went to four days. We kept them at five days as long as we could, and then we switched to four days sometime early – sometime in '98, we switched to four days.

Q. Were you ever able to go two shifts in '98?

A. No. I don't know whether we could have or not. We were getting just about enough logs for five days, but we couldn't sell it, so we cut to four days, cut to four days and tried to hold the logs back. There was five days logs but there was never 10 days logs.

Q. Now, as you encountered this decline in the lumber in late '97, and throughout your time into '98, did you see log prices decline as well?

A. No.

Q. They were high?

A. They continued to stay up.

Q. Both in Toledo and Longview?

A. Yes.

Q. Now, Mr. Nelson, you've been in this business for 40 [Tr. 108] years. In your experience, is there generally a relationship between the lumber market and the log market?

A. Yes, pretty much so. They go parallel to each other.

Q. How would you – which follows which?

A. The lumber price goes up, the log price goes up.

Q. Did the log price follow the lumber market?

A. Yes, it does.

Q. Prior to the late 1990s, have you ever seen a situation where the alder log market was not following the lumber market?

A. Not on a long-term basis.

Q. By long term, you mean a matter of months?

A. Yes, less than a month.

Q. Based upon your observations in the industry is the same principle, the log market follows the lumber market, true for softwoods?

A. Yes, it is.

Q. Now, you've mentioned that the Toledo mill was unable to procure enough logs to run two shifts. Did Ross-Simmons, the Longview plant, provide any help in connection with the log supply situation with the Toledo mill?

A. Yes, we did.

Q. What did you do?

A. We hauled logs from Longview all the way down there. I could find them in Longview and haul them cheaper down

* * *

[Tr. 110] in prices. We didn't anticipate the drastic one that went up, but there would have been a raise anyhow. And I projected that in one of my studies that I had given to the Simmons family.

Q. Based upon your observations, did the 100 to 150 dollar increase in price bear any relationship to what you expected?

A. No.

Q. What did you observe about the activities of Northwest Hardwoods or Weyerhaeuser log buyers in and around the Longview area?

A. In what way?

Q. What did they do in the log market from what you observed in '96 and '97?

A. They kept the price fairly high as things started to climb in late '97. While the market was declining, it did the same thing there.

Q. So the log market was going up while the lumber market was coming down?

A. Yes.

Q. And the six to $800,000 that you mentioned was a conservative projection?

A. For STEDCO?

Q. For the Joint Venture.

A. Yes.

* * *

[Vol. 2-A Tr. 36] to volume and scribner of the logs going into the mill for Ross-Simmons?

A. Yes, I think so.

Q. Even though some of that log has gone into chips, you are still getting as much, under the measuring system, lumber out the end because of the difference in the way in these measuring systems?

A. Yes, the scale. We recover more than the scale said was in the log.

Q. Now, during this time frame that you were running Ross-Simmons, how would you characterize the log supply?

A. Adequate.

Q. Relatively stable?

A. Stable and a lot more than we needed.

Q. Now, I would like to put on the screen an exhibit that has been marked as Exhibit 98.

Now, it is a little busy, and we will try to solve that in a minute. But are you familiar with this exhibit, Mr. Nelson?

A. Yes, I am.

Q. Have you reviewed the data from Weyerhaeuser that went into making up this graph?

A. Yes, I have.

Q. Is this the log inventory for the Weyerhaeuser alder sawmills in Oregon and Washington over about an 11-year [Tr. 37] period?

A. Yes, it is.

Q. Which color is for the Longview mill?

A. Green.

Q. And which color for the Arlington, Washington, mill?

A. Blue.

Q. Which color for Centralia?

A. Red.

Q. And those were the Weyerhaeuser alder mills up until 1995 when they acquired three other mills. Is that right?

A. Yes.

Q. Now, let me ask you a few questions about the inventory levels. First off, we see the other three mills coming in where I put that arrow. Is that correct?

A. That's right.

Q. Now, based upon your background and experience, Mr. Nelson, what level of log inventory should the Weyerhaeuser Longview mill have been running at to process efficiently on two shifts but avoid log staining?

A. Four to five weeks, six weeks at the most.

Q. If you were to convert that into millions of board feet of logs per month, what would it be?

A. Somewhere between 4- and 5-, 6 million.

Q. That would be this area here, 4- to 6 million?

A. Yes.

[Tr. 38] Q. We have a line going across at 6 and a line going across at 4. Is that right?

A. Yes.

Q. And this graph shows on this axis thousands of board feet, but you can convert it into millions just by using the first number. Is that right?

A. That's right.

Q. So we have got the 6 million mark up here, 16 up here. Is that correct?

A. That's right.

Q. All right. Now, were you at Ross-Simmons during this entire '89 through '98 time frame?

A. Yes, I was.

Q. I would like to call your attention to some real spikes in the log inventory at Longview in '89 and '93. Do you remember those years?

A. Yes, I do.

Q. And at inventories at the Weyerhaeuser Longview mill?

A. Yes, I do.

Q. What do you remember happening in those two particular years?

A. Those two particular years they went out to buy every log they could get.

Q. Did it appear they were trying to deprive Ross-Simmons of logs?

[Tr. 39] MR. SIMON: Objection, leading.

THE COURT: Objection overruled.

THE WITNESS: That would be my assumption. I saw no other reason to build that kind of inventories in the summer.

BY MR. HAGLUND:

Q. Now, if one looks carefully at the bottom axis, can you see little gradations of the scales so you can track where this inventory was built in the given year in terms of summer or winter?

A. Yes.

Q. Generally the other spikes that you see for Longview, as you look at this Exhibit 98, where are they building the inventory, leaving out '89 and '93?

A. Normally in the fall.

Q. Is that fairly standard?

A. Yes. It is usually, September, October we start building inventory for the winter.

Q. Why do alder mills do that?

A. Scarcity of some alder logs. The volume in the wintertime, because of the adverse conditions of the logging and the wet ground.

Q. So whether it is alder or Douglas fir, there is less logging in the wet winter months?

A. There is a little bit less. Basically we get it [Tr. 40] because if there is an adverse weather condition for two or three weeks and it snows or ices or whatever, logging is not as big in the wintertime, but it is consistent production coming out every month.

Q. All year round?

A. Yes.

Q. But somewhat lower in part of the winter?

A. Yes, it is. The small logger quits logging in the winter completely basically.

Q. Is there any reason in the alder industry why you do not build log inventories large in the summer?

A. Because it stains so fast. It picks up a stain from the heat and moisture and turns it blue. It is a defect. Stain is a defect.

Q. Does the industry grade for that defect?

A. Well, we didn't – we used to drop the grade tremendously until Northwest started having so much trouble with stain. They developed what is known as paint 1 and 2, clear paint, sold it at a lot less money. The stain was sound, but you couldn't use it in clear, pretty furniture. You had to paint it. So they developed a grade to cover for stain in these kind of spikes.

Q. So when you use the term "paint grade," what does that mean? The end user has to deal with the stained piece of lumber that is called a paint grade?

[Tr. 41] A. Basically has to paint it some dark color that does not show the wood. Shellac varnishes. Lacquer. Most of it went into lacquer furniture. It is in Chinese-type furniture that is highly lacquered and covers the wood completely. It looks like plastic, at least the stuff I saw looks like plastic.

Q. Did that fetch a lower price than the same piece of wood without stain?

A. Yes.

Q. Now in '89 and in '93 were these inventories built beginning in either the summer or the spring?

A. Early spring.

Q. And did you observe these buildups of inventory at Ross-Simmons in '89 and '93?

A. At Ross-Simmons or Weyerhaeuser?

Q. While you were at – thank you. While you were at Ross-Simmons in these two years, did you observe this runup in inventory?

A. Yes, we did.

Q. In your opinion, Mr. Nelson, was there an unusually high volume of pulp wood in those inventories in those two years?

A. No, it wasn't.

Q. How do you know that?

A. I watched them go right by my door. I watched them [Tr. 42] being dumped in the water. They started dumping in the water when the yard got full. They weren't all pulp. At most they were half pulp and less than that. I would have sawed everything on those trucks.

Q. These were sawlog loads coming in predominantly?

A. That's what I would call them. There was more pulp in the stuff that went into the water but not the stuff that went into the mill.

Q. At the log yard did you see an unusual quantity of pulpwood compared to the inventories in other years for Northwest Hardwoods?

A. No, not an appreciable amount.

Q. Did you observe stain problems at the Longview Weyerhaeuser mill in these two years?

A. Yes, I did.

Q. Was it significant?

A. I would be – for me it would. I would say it was significant.

Q. Is '89 when the paint grade term first surfaced?

A. That's when I recall it first surfacing, yes.

Q. It was a sales mechanism for selling this stained lumber?

A. Yes, it was. It was a good one, too.

Q. But it still was at a lower value?

A. Yes, it was.

[Tr. 43] Q. Now, I would like to shift – one other question. We don't see those kinds of inventory peaks at the other Northwest Hardwoods' mills where the large spike is built in the summer months on this chart, do we?

A. No. The rest of them show pretty much fall or winter.

Q. And generally much fewer, significant fewer peaks for the other five mills? Is that right?

A. Yes. Normal amounts except for the one at Arlington in '97.

Q. Now, Exhibit 89, Mr. Nelson, tries to make it a little less busy by pulling out only the Longview log inventories. Again, do my arrows point out the '89 and '93 spikes?

A. Yes, they do.

Q. Do you know, Mr. Nelson, of any legitimate business reason for Weyerhaeuser to have built those levels of log inventory at its Longview mill in '89 and '93?

A. The amount of sawlogs in those bundles were only to take them away from somebody else.

Q. Because they stained on the ground?

A. Yes.

Q. What did you see happen in the Columbia River?

A. A lot of the rafts sunk. They took a barge out to pick them back up. I took a boat out and watched them do it. They picked up silt out of the Cowlitz River. It set there too long.

[Tr. 44] Q. If log rafts sink and pick up silt on the river, is that a problem for manufacturing them into lumber?

A. No. It makes more cost to get them to the mill. A log under water preserves it.

Q. The logs in the river were not staining, but they were there so long they sank?

A. Yes. They didn't stain unless – when you take them out, it stains real fast. I'm sure they processed them pretty fast. They know how to fix it.

Q. Okay. Mr. Nelson, I would like to ask some questions about log bidding practices in the alder industry. Could you describe for the jury the typical situation that log buyers in the industry experience when a logger or a landowner is

going to harvest some timber in a given year and wants to sell the alder that is coming from their stand. What typically happens in your experience?

A. Normally that logger – there is four mills within the range of Ross-Simmons including Ross-Simmons. Two Ross-Simmons – two Northwest mills, Ross-Simmons and Cascade. Normally that logger would go around to every mill to get a price.

Q. So he will typically make phone calls?

A. Yes. Or come in person.

Q. Now, in your experience does the logger just go get one set of prices from the mills that are buying alder sawlogs [Tr. 45] within reasonable haul radius of his location?

A. No, he doesn't. He wants to get the highest price he can.

Q. In your experience what's the typical practice by that logger or landowner?

A. I might see a logger two or three times.

Q. What's he telling you during this bidding process?

MR. SIMON: Objection. That does call for hearsay, Your Honor.

THE COURT: Objection will be overruled. Rule 701 allows a lay witness to testify within his own perception. I will permit him to testify.

THE WITNESS: Would you repeat the question, please.

MR. HAGLUND: Certainly.

BY MR. HAGLUND:

Q. Please describe what you are hearing from the logger or landowner as they go through this process?

A. That somebody else paid more – offered more.

Q. They are inquiring whether you will increase your bid?

A. That's correct.

Q. You have been in the industry for 40 years now. Is that a standard operating procedure by gyppo loggers in the industry?

A. Gyppo loggers. Landowners and forestry consultants who [Tr. 46] represent other clients.

Q. They don't just take one oral bid from a company and get one from everybody and make a decision?

A. I can't speak for everybody, but most of them know. They shop it. They shop their wood all over.

Q. When it comes to the largest landowners in the region, do they tend to follow a different practice?

A. Some of them do, yes.

Q. Could you describe that.

A. Companies like Campbell who represents large timber. Plum Creek and others, Champion, they put their timber up by the quarter. You make a bid on it on the projected volumes coming out from that mill for the next three months.

Q. So with somebody like – you referred to the Campbell, the Campbell group that manages quite a bit of forest land in this region?

A. Yes.

Q. A large landowner like that will make a projection of their total volume that will be harvested in a given three-month period. Is that right?

A. That's correct.

Q. They will send that information out to all the mills?

A. Yes.

Q. And ask you to submit a written sealed bid by a certain date?

[Tr. 47] A. Yes.

Q. So when you look at Ross-Simmons' range of suppliers, did you compete for those sealed bid quarterly volumes?

A. Yes, we did.

Q. If you were to characterize your mix of suppliers, how would it break down overall between those quarterly volume sealed bid type deals and what you got from loggers and landowners on an oral bid basis?

A. Somewhere between 15 and 30 percent.

Q. Those percentages you used would cover what category, the sealed bid?

A. Just the sealed bids, yes.

Q. So we are talking 75 to 85 percent is in the other category?

A. No, not for Ross-Simmons. Probably 50 percent is in the other category because we had a commitment from Longview Fiber that gave us about 15 to 20 percent of our logs. 50 percent of the logs are in the immediate outside area.

Q. Now, I want to break that up because it is clear how Ross-Simmons covered its log supply. Was this your experience during your entire time with Ross-Simmons, from '84 through '98 by and large?

A. Yes.

Q. So we have got 15 to 25 is the sealed bid quarterly volume?

[Tr. 48] A. Yes.

Q. Then what percentage did you say was from Longview Fiber?

A. About the same.

Q. About 15 to 25 percent?

A. Yeah.

Q. What kind of a relationship did your company have with Longview Fiber?

A. We sold Longview Fiber chips and bought logs back from them.

Q. And did Weyerhaeuser make efforts to buy logs from Longview Fiber?

A. Continually.

Q. Who got Longview Fiber's work?

A. We got 90 percent of it. Weyerhaeuser was able to get one small tree farm out of the Astoria area.

Q. Why was that?

A. I think they were concerned of putting all their eggs in one basket. Longview Fiber was a hundred percent to us. So they sold one tree farm to Northwest Hardwoods Company.

Q. Why did you get such a high percentage of their wood?

A. Originally before Northwest built the mill we got a hundred percent.

Q. Northwest Hardwoods of Longview mill came in '86?

A. Yes.

[Tr. 49] Q. So after that you were getting about 90 percent of it?

A. Yeah, we got a hundred percent for a while. After a few years, one tree farm went to them. They made sure we got their logs. They wanted to make sure we stayed in business.

Q. Why did they want to make sure you stayed in business?

MR. SIMON: Objection.

THE COURT: Overruled.

THE WITNESS: They didn't want one buyer in the area and one chip supplier.

BY MR. HAGLUND:

Q. We covered in these two categories sealed bid volume and Longview Fiber, 40 to 35 percent of supply in a given year. The balance was coming from these loggers and landowners?

A. Yes, smaller people.

Q. And that was on an oral bid basis?

A. Yes, it was.

Q. Now, what would your – once you made – got to the end of this bidding process and you got the deal from the landowner or logger, was there any paperwork that was sent out?

A. Yes. We made a purchase order with price volumes, duration.

Q. Is this typically a pretty simple, one-page document?

[Tr. 50] A. Yes, it is.

Q. It lists the prices for the various diameters?

A. Specs, yes.

Q. And it has a duration so it lays for a certain amount of time?

A. Yes.

Q. Is that standard in the industry, those purchase orders?

A. Yes.

Q. Now, there will be testimony in this case, Mr. Nelson, from Weyerhaeuser log buyers serving the Centralia and Longview mills that they never would increase their original bid to loggers or landowners above what they – above – in the face of a competing bid from Ross-Simmons. If that's what they say, are those true statements?

MR. SIMON: Your Honor, that misstates what the evidence will be. I object to the form of the question.

THE COURT: As long as it is a hypothetical by the question at the end, if that's what they say, I will allow it. Rephrase the question.

MR. HAGLUND: Okay.

BY MR. HAGLUND:

Q. I want to ask you a hypothetical question, Mr. Nelson. If Weyerhaeuser log buyers from Centralia and Longview testify that it was their personal practice never to [Tr. 51] increase their original bid to a logger or landowner in the face of a competing bid, would those be true statements?

A. I would have to say no.

MR. SIMON: Your Honor, I would like to interpose the objection that there is no way that this witness could possibly have a basis to answer that question unless he is basing it upon what other loggers have told him and there is no way to know whether those statements to be true or not, and I'm not going to have an opportunity to cross-examine those loggers or sellers unless called as witnesses.

THE COURT: Restate your question on how he knows that. The objection will be sustained.

BY MR. HAGLUND:

Q. Mr. Nelson, during your time as head log buyer at Cascade Hardwoods in Chehalis and Ross-Simmons in Long-

view, did you have frequent contact with loggers and landowners who wanted to sell wood?

A. Yes, I did.

Q. Did you also as part – did you as part of those discussions learn from them what was happening from Northwest Hardwoods or Weyerhaeuser's log buyers as they went through this bidding process?

MR. SIMON: Your Honor, I object that he could not possibly have learned from them what was happening. He might have been told by them what was happening. We have no

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[Tr. 56] A. You mean in the way of production of what we were selling?

Q. Production, sales, and mix of logs you were running on?

A. I didn't change the logs. I started sawing them and making more low grades. I went from chips to higher value lumber.

Q. Were you processing a generally small or lower end quality of log?

A. Yes, we were.

Q. So you were not producing as much of the finished lumber on a percentage basis as they would have been at that time?

A. No. We were producing a much finished lumber. We weren't producing as much higher grade.

Q. So overall lower mix of the grades because you were sawing lower quality and smaller logs?

A. Yes.

Q. As a higher percentage of your total production –

A. Yes.

Q. – compared to Northwest Hardwoods?

A. I think the things that I saw, that Northwest was about 40 percent pallet and 60 percent shop lumber, which is almost the same as Ross-Simmons was volume-wise. But grade we were way below them.

Q. Okay. I want to make sure your testimony is clear [Tr. 57] here, Mr. Nelson. When you used the word shop lumber, is that another word for finished alder lumber?

A. Finished kiln dried lumber.

Q. Now, within the shop category, you were producing the same percentage, roughly shop as you understood Weyerhaeuser was at Longview but less of the highest grades as a percentage?

A. Yes. That's what I was told.

Q. Now, if you look at page 4 again of the stipulated facts, I want to call your attention to the pretax profit column. Do you see that?

A. Yes. Okay.

Q. Did your strategy in '93, '94 and '95 generate good profits for the company?

A. Yes, it did.

Q. Now, there were a few questions I forgot to ask right after the movie or the film. That equipment, to the untrained eye, looks big and somewhat dangerous. What kind of safety record did Ross-Simmons have?

A. We had a pretty good safety record, one of the highest in the industry.

Q. And how would you characterize the skill of the crew that you had at Ross-Simmons?

A. Very good.

Q. And in terms of the maintenance, did you hire that out?

[Tr. 58] A. No. We had our own maintenance crew. Maintenance is one of the things that we worked really tough on to get production through the mill to make sure it ran.

Q. What type of approach did you take to quality control?

A. Quality control was in our sawing, our grading, planing, every phase of the business, how we sawed the log, how we trimmed it. We had green graders in the mill. We had lots of graders around to handle it.

Q. Did you have any outside inspections?

A. Yes, we did. We had our lumber inspected by the PLIB Bureau once a month.

Q. Now, did Ross-Simmons export some of its lumber?

A. Not directly, but some of our lumber went overseas through brokers.

Q. And did you periodically receive feedback from the overseas customers where your lumber was sold?

A. Yes, we did.

Q. I am putting up on the screen Exhibit 28. Are you familiar with this document?

A. Yes, I am.

MR. SIMON: Your Honor, my notes say that this page from this letter was excluded by the Court's ruling and that only the later documentation came in. We are talking about Exhibit 28.

MR. HAGLUND: Your Honor, it is my understanding

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[Tr. 66] A. Yesterday is the first time I have seen him since three days before he fired me. He didn't terminate me. He had his son do it.

Q. You suffered a heart attack the month before?

A. Yes.

Q. Now, are you being paid to give expert testimony in this case?

A. No, I'm not.

Q. When Ross-Simmons shut its doors in May of 2001, were you owed anything?

A. I had a pension coming for ten years.

Q. And have you filed a claim to be a creditor of Ross-Simmons for that pension?

A. Yes, I have.

Q. And could you tell the jury what the amount is that is still owing to you approximately?

A. Between 65- and $70,000.

Q. You were fired in 2001. You are owed money. Why are you testifying in this case, Mr. Nelson?

A. I fought Weyerhaeuser ever since I have been in the business. I don't think the way they run the business is right.

Q. Now, in preparing to give expert testimony in this case, did you review log cost data for both Ross-Simmons and Weyerhaeuser mills in Oregon and Washington for the period [Tr. 67] of the '90s through 2001?

A. Yes, I did.

Q. When Weyerhaeuser acquired three mills in 1995, Goodyear Nelson, Diamond Lumber, a total of three mills, do you have an opinion about Weyerhaeuser's ability – let me rephrase that. Poor question.

As of the end of 1995, after Weyerhaeuser had acquired the Sedro Wooiley, Goodyear Nelson, and the Garibaldi and Eugene mills of Diamond Lumber, do you have an opinion about the approximate share of the alder industry that they owned?

A. I would say approximately 75 percent.

Q. In your opinion, does that percentage – let me back up a second. What does that mean in terms of the percentage of the sawlog, the alder sawlog volume that they will be consuming in a given year after the beginning – after 1995?

A. It would have to be 75 percent of it.

Q. Do you have an – in your opinion, does that give Weyerhaeuser the ability to control the price of alder sawlogs?

A. I would think it would.

Q. Why do you say that?

A. Because they got the huge volume. They are the biggest buyer in the industry.

Q. Again, have you observed evidence of their ability to [Tr. 68] influence the alder sawlog market in this '96 to 2001 time frame?

A. Yes.

Q. Have you seen that exerted in ways designed to put pressure on competitors?

MR. SIMON: Objection, Your Honor.

THE COURT: Objection overruled.

THE WITNESS: Yes, I have.

BY MR. HAGLUND:

Q. Did you observe it specifically against Ross-Simmons?

A. Yes.

Q. Did you observe it against the Joint Venture in Toledo?

A. Yes.

Q. What is your opinion, sir, about the percentage of the finished alder lumber market that Weyerhaeuser controlled as of the beginning of 1996?

A. Probably 75 percent.

Q. Was there any transaction that occurred in 2000 that actually increased it above that level? Was there any subsequent acquisition by Weyerhaeuser?

A. They bought Coast Mountain somewhere in that time in Canada, but I'm not exact on the date they bought it.

Q. Assuming it is a stipulated fact that Weyerhaeuser bought the Coast Mountain Hardwoods mill in British Columbia in October or September of 2000, would that have increased

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[Tr. 71] Q. Did you observe in the last part of this decade any change in the historic profitability of the Longview mill?

A. Yes, I did.

Q. What happened?

A. It went down.

Q. Did you also observe a change in the way certain overhead was allocated to the Longview mill during that last couple of years?

A. Yes, I did.

Q. And I'm going to highlight the selling and general – G & A, general and administrative allocations between 1999 and 2000. Did they drop off considerably?

A. Considerably.

Q. So let me ask you this, Mr. Nelson. If you were to evaluate the performance of the Longview mill in 2000 and have cost allocations similar to what had prevailed before 2000, what would have happened to the $2.8 million profit shown there for the year 2000?

A. Might have had a loss.

Q. Now, yesterday you were asked some questions about the log market and the lumber market. Did the relationship between the log and lumber market change in a way that was unexpected in '97 through 2001 for the alder industry?

A. Yes, it did.

Q. What was that?

[Tr. 72] A. They usually go parallel, up and down. In those later years, lumber prices went down and log prices went up. They were exactly opposite of the historic trends.

Q. Have you also in preparing for this testimony examined the log prices that were paid by Weyerhaeuser for its Longview mill over a 10-, 11-year period?

A. Yes, I have.

Q. I'm displaying what has been marked as demonstrative Exhibit 115. Does this display prices for logs paid by the Longview mill over a '94 through 2000 time frame?

A. That's what it says, yes.

Q. And the lines cover different diameter classes for the Longview logs for Weyerhaeuser. Is that right?

A. Yes.

Q. And the blue line at the bottom here, if one looks at this carefully, is for the 1 to 5-inch high-quality logs. Is that right?

A. That's what it says.

Q. And we move up one diameter class to the purple and that's the 6- to 7-inch high-quality sort?

A. Yes.

Q. And is it standard that the price is going to be higher the wider the diameter of the log?

A. Yes.

Q. Now, have you also looked at the data that underlies [Tr. 73] this graph?

A. Yes.

Q. In your opinion, Mr. Nelson, is there something that happened in this last couple of years that are shown on this graph relative to the gap between the prices paid for the wider diameter logs compared to the lower diameter logs?

A. Yes. The lower diameter log that Ross-Simmons used started to climb in a falling market for lumber.

Q. Does that make sense in terms of the historic relationship you should have seen between log and lumber markets?

A. Doesn't make sense at all.

Q. What, in your opinion, ultimately caused Ross-Simmons to shut its doors in May of 2001?

A. A large amount of it was the high price of logs they had to pay when the lumber prices dropped.

Q. And was the bread and butter a part or a significant part of what Ross-Simmons had historically done, at least under your tenure, these lower or smaller diameter logs moving up in price during this time frame?

A. Yes, it was.

Q. Now, I would like to turn to another subject. That is the Simmons family. When you were managing Ross-Simmons from 1993 through May of 1998, did the Simmons family interfere with your ability to manage the sawmill?

* * *

[Tr. 85] BY MR. HAGLUND:

Q. Mr. Nelson, I want you to assume that the $20 million figure from the Novak letter was used as the basis for scenario A of the damages calculated by Mr. Rasmussen, okay?

MR. SIMON: Your Honor, I will object. It assumes facts not in evidence.

THE COURT: Objection overruled.

BY MR. HAGLUND:

Q. You have reviewed Mr. Rasmussen's expert witness statement in this case?

A. I have.

Q. Are you familiar with the figures that are shown on what is Plaintiff's Exhibit 126 that is shown here in full size?

A. Yes, I am.

Q. And is the $20 million number the basis for the scenario A calculation?

A. Yes.

Q. What's your understanding about – let me do it this way. Scenario A is this first one, correct?

A. Yes.

Q. And the dollars per thousand board foot column right there lists numbers in thousand board feet. Is that correct?

A. That's right.

[Tr. 86] Q. Let's take 1998. The memo was written in March of 2001 and discusses the past two to three years, correct?

A. Yes.

Q. Is this $89 the amount per thousand board feet that the Weyerhaeuser alder division log costs would have gone down across the whole division as an average if you divided their total consumption into that $20 million?

A. Yes.

Q. Is that then just multiplied by Ross-Simmons' consumption each year?

A. Yes.

Q. To derive the amount of reduced cost or lost profit for that year?

A. That's correct.

Q. So just so that the jury understands the calculation – we won't go through each one – but very simply it just derives the reduced Northwest Hardwoods or Weyerhaeuser log costs, given $20 million and their consumption in that year in 1998, that was $89, you multiply it by what Ross-Simmons actually consumed in terms of logs. 35.1 million board feet and the dollar value is $3,128,439?

A. That's correct.

Q. And do we see the same calculation made for the next three years?

A. Yes.

[Tr. 87] Q. Again, using Weyerhaeuser's actual consumption to derive the impact of a $20 million savings?

A. Mike, I did this on my own. I come up with a few dollars higher than those figures but very close to what he has got. Your statement is correct.

Q. And the total then, using this scenario, the $20 million figure from Mr. Novak's memo shows a total lost profit associated with this log cost increase over the four years of $9.67 million?

A. Yes. If we had been able to buy the logs at that price, yes.

Q. Okay. Would that – if your log costs go down, does it flow right to the bottom line?

A. Yes.

Q. You don't have any – you just have a reduced input cost?

A. That's correct.

Q. Now, let's talk about scenarios B and C. You reviewed Mr. Rasmussen's expert witness statement?

A. Yes, I did.

Q. Are these based upon different projections of profits – historic profit levels by the alder division of Weyerhaeuser?

A. By what? Excuse me?

Q. Are they based upon different historic profit levels [Tr. 88] projected forward for Northwest Hardwoods?

MR. SIMON: Your Honor, I would like to have an objection, a continuing objection to this testimony subject to it being linked up with appropriate testimony with Mr. Rasmussen.

THE COURT: Most of these are hypothetical questions.

MR. SIMON: Thank you.

THE COURT: Restate the question.

BY MR. HAGLUND:

Q. You reviewed Mr. Rasmussen's material?

A. Yes, I did.

Q. It is scenario B. I want you to assume that scenario B is based upon Mr. Rasmussen's analysis and he projected B and C based upon looking at the historic profitability of

Northwest Hardwoods before 1996 and then trending it forward from '97 through '01 had they made a similar level of profit, and further that he uses –

A. Mike, Mike, Mike, can I disagree with you?

THE COURT: Yes, you can.

THE WITNESS: This is the profit – the volumes for Ross-Simmons. If I recall – and I redid all of Mr. Rasmussen's figures from the information you gave me – this scenario is the five years of Longview prices or ten years there. I think the one below we can't see is five [Tr. 89] years of Longview's prices.

Q. That's correct.

A. So if Longview had taken this $20 million cut, their share of it would have been those log prices I think is what we came up with, but Longview on its own, with its volume, I think.

Q. We will let Mr. Rasmussen go into this in detail.

A. I did it a little different than him but come up with the same thing.

Q. Let me ask you a couple of quick questions. You have reviewed Mr. Rasmussen's approach and you came up with numbers that are very similar. Is that correct?

A. That's correct.

Q. So under scenario B, we are looking at a $12 million lost profit in four years?

A. Yes.

Q. And under scenario C it is 12.7?

A. Yes.

Q. We will get into more of the detail with Mr. Rasmussen who prepared this when he is called probably tomorrow.

Now, had Ross-Simmons had the log costs that are reduced to the levels shown in any one of these three scenarios, would Ross-Simmons have been profitable in '97, '98, '99, 2000 and 2001?

A. I would have to say yes.

* * *

[Tr. 94] you find the year end profit and loss statements for the Weyerhaeuser alder mills from 1997 through 2001?

A. Yes.

Q. And you looked particularly at the Longview mill. Is that right?

A. That's right.

Q. And on the cover page, I want to blow it up here. Let's look at 1997 and 1998. The middle column, this volume is in thousand board feet?

A. Yes.

Q. And third party, right here, what does that refer to?

A. That's all the people they bought logs from other than Weyerhaeuser.

Q. So these are the logs they would have purchased on the open market?

A. Yes.

Q. In 1997 that was 28.08 million board feet?

A. Yes.

Q. The average price per thousand board feet for those logs was $459?

A. That's correct.

Q. Then we have Weyco here in the second line. What does that refer to?

A. That's the amount of logs that come off Weyerhaeuser fee land, land that they own.

[Tr. 95] Q. So company land?

A. Company land.

Q. Are there large – does Weyerhaeuser have significant land holdings in southwest Washington tree farms?

A. Well over a million acres.

Q. So in 1997 17.5 million board feet was delivered from company lands, and the average cost is shown at $330 per thousand?

A. That's correct.

Q. And the difference is 129 bucks and the total difference is 2.25 million?

A. Yes.

Q. Does this summary show the same calculation for 1998 and succeeding years?

A. Yes, it does.

Q. Now, in your opinion, Mr. Nelson – well, let's look at '98 for a second. Is that a year when the company lands provided well over half of the total needs of the Longview mill for Weyerhaeuser?

A. Yes, it is.

Q. The 25.6 million compared to 19.9?

A. Yes.

Q. And the difference was actually higher in that year at $165 a thousand?

A. Yes.

* * *

[Tr. 110] Q. That was part of your severance agreement with Ross-Simmons?

A. That's correct.

Q. A severance agreement is not a contract?

A. It is a contract, but it is not my regular contract. It was something negotiated separate.

Q. You had a separate negotiated contract with Ross-Simmons and that contract prohibited you from working in the industry for three years?

A. Within 150 miles of Longview.

Q. That contract expired in 2001, correct?

A. Yes.

Q. May 2001?

A. Yes.

Q. After that you started working as a consultant for a new hardwood mill, correct?

A. No. For a new company but not a new hardwood mill.

Q. A new company that was bringing back an old mill, am I correct?

A. Yes. Pacific Hardwood.

Q. And the new company that you were consulting for was at the Willapa Bay Company?

A. Willapa Bay Hardwood Company.

Q. I'm sorry. Willapa became incorporated in 2001, am I correct?

[Tr. 111] A. Yes.

Q. They cut alder logs?

A. Yes.

Q. The main owner and president of Willapa Bay is Mr. Jamie Webber?

A. Yes. Hold on. You said main owner. What did you say?

Q. Main owner?

A. No, he is the president.

Q. Who is the main owner?

A. There is no main owner. There is 22 stockholders. Not more than one person owns more than 5 percent.

THE COURT: What does this all have to do?

MR. SIMON: New entry into alder mills. This is a new entry that came up in 2001.

THE COURT: What difference does it make?

MR. SIMON: It goes to market power.

THE COURT: You're going to show another company came into business?

MR. SIMON: Yes.

THE COURT: Let's get to it.

BY MR. SIMON:

Q. What we have in 2001 is a new company called Willapa Bay Hardwood Company that began in 2001, correct?

A. Yes. They took over the old sawmill that was shut down.

[Tr. 112] Q. They took over an old mill that had been shut down, and they now used that mill to make, to cut alder lumber?

A. Yes.

Q. That happened in 2001?

A. Yes.

Q. The president is Jamie Webber?

A. Yes.

Q. You are one of the owners of that company?

A. No, I'm not.

Q. You were offered stock?

A. I have a stock option to buy.

Q. That company considers one of its competitors to be Northwest Hardwoods, correct?

A. Not really.

Q. Does Northwest Hardwoods cut and sell alder logs?

A. Yes.

Q. Willapa Bay cuts and sells alder logs?

A. We cut pulpwood.

Q. Does Northwest Hardwoods cut pulpwood?

A. Not really. They cut a better log.

Q. Does Northwest Hardwoods make hardwood chips out of pulpwood?

A. Yes, they do.

Q. Does Willapa Bay cut and make alder chips out of pulpwood?

[Tr. 113] A. Not very many. We saw them into lumber.

Q. There are a number of hardwood associations in the United States, correct?

A. Yes.

Q. You are familiar with the Northwest Hardwood Association?

A. Yes, I am.

Q. The Western Hardwood Association?

A. They are the same.

Q. The National Hardwood Association, is that different?

A. That's National.

Q. The Hardwood Lumbermen's Association, is that different?

A. Yes.

Q. The Appalachian Hardwood Association, is that different?

A. Correct.

Q. The San Diego Hardwood Association, different?

A. Yes.

Q. The Los Angeles Hardwood Association?

A. Yes.

Q. The New England Hardwood Association?

A. Yes.

THE COURT: Let's make a list of those and submit them with a stipulation. Let's move ahead.

* * *

[Tr. 117] "QUESTION: What were you dissatisfied with respect to Gary Nelson's performance?

"ANSWER: I didn't think he could do his job right.

"QUESTION: Did you fire him?

"ANSWER: I couldn't fire him.

"QUESTION: Why not?

"ANSWER: John Simmons wouldn't let me."

Did I ask you those questions and did you give me those answers?

A. Yes, I did. That doesn't mean I wanted to fire him, though.

Q. Did Ross-Simmons have an optimized board edger?

A. No, we didn't.

Q. Did Ross-Simmons have a stereo scan on its head rig?

A. No.

Q. With respect to the gang saw at Ross-Simmons, will you tell me what the width of the saw cut – the width of the saw cut made by that gang saw was?

A. I can't tell you that. It was 90 plate. We had it on the saw. That's pretty thin.

Q. In the 1990s through 2000, did the quantity of alder lumber sold in the United States increase, decrease or stay the same?

A. All alder lumber – alder lumber or hardwood?

* * *

[Tr. 122] decreasing?

MR. HAGLUND: During what period?

MR. SIMON: 1990 to 2000 period.

THE WITNESS: Stayed about static. It was bigger in the first part of the '90s; went down and stayed static with that.

BY MR. SIMON:

Q. On page 61 of your transcript from September 12th, 2002, we had just been talking about the time period of the

past ten years. I took your deposition in 2002. Begin on page 61, line 24, continuing through page 62 on line 4. Did I ask you these questions and did you give me this answer on that very topic?

"QUESTION: Do you have any understanding of whether the supplies of harvestable alder timber has been increasing or decreasing?

"ANSWER: It has been decreasing."

Why is that?

A. Mostly for environmental reasons. But the harvest stayed about the same. The harvestable wood out there has been going down. Most of it we couldn't use anyhow.

Q. For how long a time period had the quantity of [Tr. 123] harvestable alder timber been dropping?

A. Pardon me?

Q. For how long a time period had the quantity of harvestable alder timber been dropping?

A. Probably since the mid '90s. I am guessing now, without having the figures in front of me. You must have them in front of you. Can you tell me?

Q. That's exactly what you said.

A. Okay. Yeah.

Q. You were on the Washington Hardwood Commission, correct?

A. Yes, I was.

Q. You did an aerial survey of the hardwood in western Washington?

A. Yes, I did.

Q. After you got that done, you got it computerized?

A. Yes.

Q. You added in ecological setbacks of fisheries. As a result you saw harvestable alder timber drastically drop, correct?

A. Yes.

Q. If I may approach the clerk with a list of exhibits I will be using.

Mr. Nelson, I take it from your testimony of Mr. Haglund you had, when you were Ross-Simmons, keeping track of what the competitors had been doing – .

A. Excuse me. Would you repeat that, please.

Q. When you were at Ross-Simmons, you had been keeping

* * *

[Tr. 130] Q. What's the relevance of whether or not a company has small log conversion capabilities in the good management of an alder mill? How is it relevant?

A. How is it relevant in the management of it?

Q. How is it relevant in the running of the business?

A. A smaller log, you can efficiently cut. The better you can do your job.

Q. It helps improve the efficiency of the mill then?

A. Correct.

Q. Did Ross-Simmons/STEDCO Joint Venture have small log conversion capabilities?

A. No, we hadn't got there yet.

Q. While you were at Ross-Simmons, Longview Fiber sold almost all of its alder logs to Ross-Simmons, correct?

A. About 90 percent.

Q. You had a supply relationship with Longview Fiber. They would supply you with about 90 percent of their alder logs; you would supply them with chips, correct?

A. At times we sold them, chips, yes, whenever they wanted them.

Q. That was a long-term relationship that Ross-Simmons had with Longview Fiber?

A. Yes. It happened long before I got there.

Q. It continued while you were there?

A. All the way through it, yes.

[Tr. 131] Q. All right. Ross-Simmons had other supply relationships with other suppliers, correct?

A. What are you talking? Logs or chips now?

Q. Logs.

A. Yes. We had a few small loggers that always came to us.

Q. Olson & Burk was always committed to selling Ross-Simmons logs while you were there?

A. On one series of a three- or four-year period when they were in a heavy land buying basis and logging.

Q. But Olson & Burk had committed to you to sell Ross-Simmons all of its hardwood logs?

A. At that particular time, yes.

Q. An exclusive contract?

A. It could be, yes. I might agree to that.

Q. Let's talk a little bit about the proprietary lumber grading system. Did Ross-Simmons follow the Weyerhaeuser proprietary alder lumber grading system for its alder lumber?

A. I would say we were close to it. I can't be absolutely sure of that. But that was started by Juel Sheldon who had came from Northwest, and he agreed with Arnold's grade or Northwest's grade, and I think we followed it pretty darn close.

Q. There has been talk about Juel Sheldon and he has been

* * *

[Tr. 135] Diamond became part of Weyerhaeuser? Do you believe that Northwest Hardwoods faced much competition for the purchase of alder logs, say, in the Eugene area?

A. No, I don't.

Q. Did Northwest Hardwoods face much competition for the purchase of alder logs, say, around the Longview area?

A. Yes, they did.

Q. At least Ross-Simmons?

A. Ross-Simmons and Cascade and Centralia competed against their own mill.

MR. SIMON: I apologize for not setting this up before, Your Honor, but may I bring over the butcher paper?

THE COURT: You may.

MR. KELLEY: Your Honor, may we approach the exhibit?

THE COURT: You may.

BY MR. SIMON:

Q. Mr. Nelson, based upon your experience, I am going to ask you some additional hypothetical questions. Mr. Haglund asked you some hypothetical questions. I am going to do the same.

Assume that we have three areas: Area A, area B, area C. In one area there is only one company buying alder sawlogs. It is not facing much competition in the sense that you and I were talking about?

[Tr. 136] A. Yes.

Q. In area C there is one company buying alder sawlogs, not facing much competition in the areas that you and I talked about – in a way that you and I talked about.

In area B there is at least three competitors competing to buy alder saw logs. Are you following me?

A. Yes.

Q. Which area would you expect to find the highest alder log prices, A, B or C?

A. B.

Q. Why?

A. Because of competition. But I would say one other thing, Mr. Simon, if you had three mills in that area, there would be a lot more timber in that area.

Q. Regardless of the amount of timber, where there is more competition, one would expect to see prices higher, correct?

A. That's correct.

Q. There has been some talk about Ridgefield. I want to make sure we are all understanding the various facilities that Ross-Simmons was involved in. The main sawmill for Ross-Simmons was in Longview, correct?

A. Yes.

Q. And later we have the Joint Venture that had entered into with the Confederated Tribes in Toledo, Oregon?

A. That was later, yes.

* * *

[Tr. 148] A. I wouldn't say that, but what we meant there in comparison to the two prices. I wouldn't say acceptable or not. It says they are cheaper than what we were getting them in Longview.

Q. Sir, I asked you that same question on page 82 of your transcript from the deposition taken on May 15, 2002, page 82, line 3 through line 7. Did I ask you this question and did you give me this answer on that very topic.

Sir, did I ask you this question and did you give me this answer on page 82, lines 3 through 7:

"So you had an adequate supply of logs at an acceptable price for the Longview mill and that's why you didn't come to Toledo for logs?

"ANSWER: I would say that's correct."

THE COURT: That's not impeachment. That's exactly what he said. Let's get on.

BY MR. SIMON:

Q. Did that continue to be the case, Mr. Nelson, that you had an adequate supply of logs at an acceptable price for the Longview mill up until the time you left in May of 1998?

A. Are you asking me that or are you reading that to me?

Q. I'm asking the question right now. If you give me the answer you gave me there, I won't read it.

A. I would say we did, and we kept going.

MR. SIMON: Your Honor, I'm now about to move into

* * *

[Vol 2-B Tr. 14] I have to admit that.

Q. Yes, sir. We can now move to the end of this clip and see the end of that. And there it goes down to the chipper?

A. That goes to a chipper, yes, to a chain that drags it to the chipper.

Q. Which means it doesn't get sold as saleable lumber?

A. No, it's turned into chips.

Q. And obviously you get more value and money from saleable lumber than chips?

A. That's correct, about three to one.

Q. Take a look at Clip 15, which also was not included in what you showed.

Stop here for a moment.

What was this gentleman doing?

A. That was shown in the film. That is one of our graders pulling the dry lumber back and trimming it back for grade.

Q. In your judgment, was he trimming too much off?

A. I can't say anything about it until I see the whole board.

Q. Also let me ask you before we see it, is it ever appropriate to trim two boards stacked together?

A. I wouldn't think so, no, unless it's just the end of it and we trim them to eight feet.

Q. All right. As we look through the rest of this film, when you look out to see if there were two boards stacked on

* * *

[Tr. 22] A. Yes.

Q. You were asked some questions about the harvestable supply of alder, and I just have a couple of questions here. You were on the Hardwood Commission and it did a study of the available alder supply in the region in the late '90s; is that right?

A. That is correct.

Q. And that was an analysis of the alder trees that would be available for harvest in the region?

A. Yes.

Q. And certain set asides or riparian areas adjacent to rivers and streams was reducing the volume of harvestable alder available if you look at the 100 percent of it that there is in the region; is that right?

A. That's correct.

Q. Now, I want to ask you a question about the different – those were questions about the standing timber and what would be available for harvest. My question for you, sir, is between 1996 and 2001, how would you describe the actual supply, what was harvested and came into the market? Was it relatively steady, was it increasing, was it falling?

A. I think it was steady at that point. It had already dropped a little bit in volume, but it was steady.

Q. From '96 to 2001?

[Tr. 23] A. I would think so, yes.

Q. Thank you. You were asked about some contracts with Longview Fiber and Olson and Burke. Did you ever have a written – formal written agreement with Longview Fiber?

A. I think we did, but it changed, so I don't know that we had it in effect all the time.

Q. Did you ever have a formal written agreement with Olson and Burk?

A. No, not to my knowledge.

Q. The Indian lands that Mr. Simon asked you about, were you – when you went into the Joint Venture with the Siletz Tribe, was a key part of the Ross-Simmons' decision

to pursue that Joint Venture based upon the expectation that the Federal Government would give or grant the tribe another 20,000 acres?

A. No, it wasn't.

Q. It was only a possibility and it never came to pass?

A. I thought it was a pipe dream.

Q. Lastly, regarding that film, was there anything you were trying to leave out that you didn't want the jury to see?

A. No.

Q. We were only trying to be more efficient in the presentation.

A. The film was actually two hours long.

* * *

[Vol. 2-B (Apr. 9, 2003)] [Testimony of Grant Wheeler]

* * *

[Tr. 24] THE COURT: Further questions?

You may step down.

Call your next witness.

MR. HAGLUND: Your Honor, we were planning to call – use the videotape of David Weyerhaeuser, but we've got four witnesses we'd like to get on –

THE COURT: All right.

MR. HAGLUND: – in rapid fashion.

THE COURT: Call them.

MR. HAGLUND: Grant Wheeler.

GRANT WHEELER

Was called as a witness on behalf of the Plaintiffs, was duly sworn and was examined and testified as follows:

THE CLERK: Please state your name, and spell your last name for the record.

THE WITNESS: Grant Wheeler, W-h-e-e-l-e-r.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Wheeler, I understand that you have three years of college, two at OSU in forest engineering and one at the University of Oregon in business; that you, in 1980, [Tr. 25] purchased your family business called Westwood Industries from other family members, a company that had been in business since 1946 remanufacturing alder lumber into various products; and that in 1998, you also started a company that you are the president of called Westwood Lumber that operates an alder sawmill in Reedsport, Oregon.

Is that all correct?

A. Yes, it is.

MR. HAGLUND: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. HAGLUND:

Q. Mr. Wheeler, I'd like to ask you if you could – if you would, to come down from the jury – or the witness box there, and I just want to bring you a few pieces of product and ask you to explain what they are.

A. This is a product that we make. It's a guitar body blank for Fender Musical. We make all of their guitar body blanks. This is a veneered alder core. Inside is alder. It has a P grade. This is for a Mexico product. It is a little less expensive guitar than the one that Mr. Haglund is holding there.

And this would be machined. We don't do the machining. We make this blank, and then Fender machines them into the body itself. And those are a couple more [Tr. 26] bodies. Those are both American guitars made in their facility in Corona, California. This is a little higher end guitar body blank. That's an alder color-matched product. Again, that's for American – probably a more expensive guitar, also for Fender.

Q. Now, the blank that I'm holding here, is it made up of multiple pieces of alder lumber?

A. Four, yes.

Q. And how are they attached?

A. They're glued today.

Q. Okay. And your company –

A. Yes.

Q. – has been making this kind of blank for Fender for years?

A. Approximately 15 years, yes.

Q. And what's this?

A. That is a machine body blank. That is – that has a maple veneer on it, but that is also – the core is just a thin maple veneer, but the core is also alder. That's a four-board – what we speak of as a four-board spread. Same as – the starting point would be that piece.

Q. Just to give the jury some understanding, what – how many of these guitar blanks do you – does your company, Westwood, make for Fender Guitar annually?

A. Approximately 250,000.

* * *

[Tr. 28] was a period there for seven or eight years that we used cottonwood instead of alder. This was from about 1990 until about 1997 that we used cottonwood, but they are back using strictly alder now.

Q. A couple other things I just wanted to show you.

The alder lumber that – I think we've talked about that sufficiently, but we've got some other products your company makes. Could you tell the jury what these are.

A. These are just some cut stock-type parts. They're alder, which over 99 percent of everything we make is out of alder.

These might be paint brush handle blanks, Purdy Paint Brush Handle Company, in fact, they're here in Portland, uses almost exclusively – again, I don't know the percentage, but it's close to 100 percent. I won't say 100 percent, but close to. We make all of these. These are all wooden handles.

We sell them to a company in Italy, the blanks – again, we just sell the blanks, then they machine out of a company in Italy, and then they come back to Portland, Oregon, in a handle form. And then Purdy Company puts the bristles in. I don't know that much about paint brushes, but the metal work around it also.

Q. So the blanks are this product?

A. These could be cut stock for kitchen cabinet parts. [Tr. 29] Again, I don't know for sure exactly what the size is, but we makes hundreds and hundreds of different sizes in cut stock-type of parts.

Q. Okay. Thank you. You can retake the stand.

A. (The witness complies.)

Q. Now, prior to 1997, where was your company obtaining its alder lumber supply to remanufacture these various products?

A. We had bought from Diamond Wood Products for approximately 15 years before that time, and then Northwest Hardwoods bought Diamond Wood Products, and, again, I don't know the exact date, but that's October 1st of '96, I think.

Q. It's stipulated, it's '95?

A. '95? Okay. Fifteen years prior to October 1st of '95, approximately 15 years, we bought from Diamond Wood Products almost exclusively.

Q. And then it shifted to Weyerhaeuser after they bought Diamond Lumber?

A. Yes.

Q. What was happening with your business at Westwood Industries in Eugene in the mid-'90s?

A. Well, it was growing very, very fast mainly because of Fender. Fender is today still our biggest customer, but Fender in 1994 or '5, they were – excuse me. One year there they were 76 percent of our business, so they were – [Tr. 30] and they were growing like crazy. I mean, going from 550 guitars a day to over a thousand guitars a day. So we were running three shifts. It was hard for us to keep up in that couple year period of time there.

Q. And Fender has manufacturing plants where?

A. Their main plant, their American plant is in Corona, California, in the Los Angeles basin there, and then Ensenada, Mexico.

Q. Now, did you indicate to Weyerhaeuser that you needed additional volume as your business was growing?

A. Absolutely.

Q. Were you able to get it?

A. No.

Q. What did you do?

A. Of course, we were buying a lot of wood from Northwest Hardwoods. As far as we were concerned, it was a lot of wood because it was our livelihood. Explained that after about approximately a year, not quite a year of being very, very tight on material, of course, the market was – the alder lumber market was very tight at that time. We went back to the sales manager, Doug Bolton and I, and the salesman, Doug Martin and I, we talked back and forth many times.

I had been into all their mills, mills in Washington also to see if there's a different way that we [Tr. 31] could get some eight quarter, and they were looking at different ways to possibly break down the log to get us more eight quarter.

And finally after three or four months of this they had said – Doug Martin had told me – excuse me, Doug Bolton, the sales manager, had told me that basically, "That's all there is. We're not going to be able to get you any more." We used the eight quarter for the Fender bodies.

And I think it was at some point later, within a day or a week or a month, some time in there, I said, "Well, we're going to build a sawmill if we can't get more wood because we have to grow," and Fender was concerned that we couldn't keep up. We were keeping up, but barely.

Q. Now, you mentioned two names: Doug Bolton and Doug Martin, are they Weyerhaeuser employees?

A. Neither one is no longer, but they were at the time.

Q. Okay. Now, you referred to eight quarter. That's two inches?

A. Two inches thick, yes. Everything we see there in the guitar bodies are all cut from eight quarter lumber, yes.

Q. Now, were you asked by personnel from Weyerhaeuser to come to a meeting to talk about your sawmill plans?

A. I don't remember whether I had – they had asked me to go or I had asked them, because I was – I was the one pushing this and at the time I don't remember. Again, I [Tr. 32] don't remember exactly what – one way or the other, I ended up in Federal Way in a meeting.

Q. So you went up to Federal Way to a meeting with Weyerhaeuser personnel?

A. Yes.

Q. And did any Weyerhaeuser personnel travel up with you?

A. Two of them from Eugene, yes.

Q. And who were they?

A. Rod Buck and Steve Carter. Rod Buck is the mill manager of Eugene and Garibaldi sawmills, and Steve Carter was – I don't know the exact title, but log procurement person, or head log buyer in Eugene – maybe it's the Oregon area, I don't know. Eugene is their biggest sawmill there.

Q. And this meeting was in 1997?

A. Yes.

Q. How many people were at the meeting?

A. Approximately 15.

Q. And you were the only person from your company?

A. Yes.

Q. The rest were from Weyerhaeuser?

A. Yes.

Q. Could you describe what happened at the meeting – well, did you hear some presentation from the vice president of operations for the alder division?

A. Heinz Hohendorf.

Q. I think it's Hohendorf.

[Tr. 33] A. Hohendorf, excuse me. I had never met Heinz before. There were a number of people there in the meeting I had not met before that day. He got up and explained and drew on a board similar to what's over there that breaking down the logs to cut more eight quarter just would not work, and it was talked back and forth, but basically it just would not work.

Q. Did he – how long was his presentation? Could you explain a little bit more about that.

A. He got up and there were different – a lot of different people were talking in the room, we were talking back and

forth, and then he got up and started drawing basically a round log and how a log would be broken down and basically saying that it wouldn't – that it just wouldn't work out cutting eight quarter out of – a heavy percentage of eight quarter out of an alder log. It just was not economically feasible.

Q. Would you characterize his presentation as encouraging or discouraging of your plans?

A. Discouraging.

Q. At some point in the meeting did David Weyerhaeuser make any statement?

A. It was just about the end of the meeting that David Weyerhaeuser – in fact, a woman that was sitting to [Tr. 34] the left of me, I don't remember, it was a U-shaped big conference table, I don't remember her name. I hadn't had any business dealings with her, any dealings at all before.

But we had been in there an hour and half, and she said to me, "What are you doing here?" or something like that. And I said, "Well, I'm going to build this mill, but I want to continue buying alder lumber from you."

And David Weyerhaeuser was sitting at the end of the table and he pointed directly at me and said, "If you continue" – I don't have these words exactly, but when he pointed at me, he said, "If you continue your plans to build this mill, we're cutting you off. You have one week to decide." I said, "I understand." And that was basically the end of the meeting.

Q. How did you take his statement?

A. I'd never met David Weyerhaeuser before, before that day. It was a little bit intimidating, 15, 16, 14, whatever number it was of Weyerhaeuser people in the room, but I definitely felt threatened.

Q. Did you make any change in your business plan as a result of his statement?

A. My original business plan was to build a little mill to supplement buying alder lumber. At that point, just after that and after getting back to Eugene, I really decided that I really had to build something that I thought I would – [Tr. 35] whether I'd be cut off or not from them, but I needed to do something to be my own supplier. So my original plan was to cut 25,000 feet a day. It changed within days after that to cut 100,000 feet a day.

Q. So if I understand it correctly, you quadrupled the size of your original plan?

A. Of the cutting capacity, yes.

Q. Now, did you go ahead and build that mill?

A. Yes. That's what we're cutting today, 100,000 feet a day.

Q. And on an annual basis, what does that work out to in million board feet annually?

A. About 25 million.

Q. Now, after the meeting broke up, did you return to Eugene with these Weyerhaeuser personnel you'd come up with?

A. Yes.

Q. Were there any discussions?

A. It was pretty quiet, but, yes. I had known both Rod Buck and Steve Carter for some time, so it wasn't like I just met them, but I remember talking to Rod Buck and telling my displeasure with the meeting, and that – because he had asked me after a few minutes, after – on our way home, "What is your plan now?" And I said, "I'll have to think about it, but I'm not pleased with what I heard today."

* * *

[Tr. 37] A. Well, basically he just said – it was a short message, but he had said that some things were said in the meeting that probably shouldn't have been said. I don't remember word for word what was said, but that's really all I remember. I do remember, "Some things were said that shouldn't have been said."

Q. Now, when did Westwood Lumber, your mill in Reedsport, start up?

A. 1998, I believe.

Q. So it would have been first producing lumber in that year?

A. Yes, I believe June of '98.

Q. See mid year?

A. Yes.

Q. Does your company compete with Weyerhaeuser for alder saw logs?

A. Absolutely. They're our only competition or we consider them our only competition.

Q. What is your opinion about Weyerhaeuser's influence on the market in Oregon for alder saw logs?

A. They own the business as far as, again, in my opinion, they're 75 percent of the market, but we have – for us to get logs, we have to pay their price. I mean; we don't – our log suppliers generally get Weyerhaeuser's price for a quarter or for a month, and then we – if we are at that

* * *

[Tr. 38] price, we get wood. We don't have to necessarily pay more, but it's – we don't set the price. We're not –

Q. Weyerhaeuser in your experience sets the price –

A. Absolutely.

Q. – in the alder saw logs –

A. Absolutely.

Q. For the benefit of the record, I have to get my whole question out.

In the alder saw log market, your experience from mid-'98 through '01 is that Weyerhaeuser sets the price; is that correct?

A. And it is today, yes.

Q. Do you have an opinion about where the alder saw – where the – where alder saw log prices have been in the '98 through '01 period relative to the lumber market?

A. Well, my understanding, and I don't see all the sawmills' books obviously, but log prices are up and profits are down. And I think that's straight across the board in all alder sawmills.

MR. HAGLUND: No further questions.

THE COURT: Cross-examination.

MR. SIMON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Wheeler, my name is Michael Simon, one of the

* * *

[Tr. 42] Q. The people in the music industry, the people that know guitars better than I do, they know that different types of hardwoods have different types of sounds, correct?

A. Yes. That's debatable in electric guitars.

Q. Now, if a customer wanted to go into a guitar store, could they order a Fender guitar in poplar?

A. There is – my understanding is there is one. We have, I believe, one part number out of approximately 60 – between 60 and 80 body blanks that is poplar today.

Q. Now, let's go back to the conversations relating to the other issues. To make sure I understand the chronology right, that before Northwest Hardwoods acquired the Diamond mill in Eugene, your business, Westwood Industries, bought almost all of its alder needs from Diamond?

A. Over 99 percent.

Q. And that continued after Northwest Hardwoods came into the scene in 1995?

A. Yes.

Q. You continued to get all or almost all, 99 percent of you alder needs from the Northwest Hardwoods mill in Eugene?

A. Yes.

Q. Okay. Now, during the mid-1990s, alder lumber was very much in demand, correct?

A. Yes.

Q. You would say it was a very, very hot market?

[Tr. 43] A. Yes.

Q. Now, your business was growing, you told us that?

A. Yes.

Q. You wanted to buy more alder lumber?

A. Yes.

Q. You were receiving a lot of alder volume from Northwest

Hardwoods?

A. Yes.

Q. And you still wanted more?

A. Yes.

Q. Now, Northwest Hardwoods wasn't able to give you as much volume as your growing business needed at that time?

A. Correct.

Q. And this is way before the David Weyerhaeuser conversation, right?

A. I wouldn't say way –

Q. A year before?

A. A year before, yes.

Q. And so they explained that they had so much demand for their alder lumber product, they gave some to you, some to another guitar manufacturer, another customer in Eugene called Whittier, and they gave some to other customers?

A. Yes.

Q. They essentially put them on allocation, correct?

A. Correct, yes.

[Tr. 44] Q. And they explained this process to you, and they said, "We'd like to give you more, but we've got to be fair to other customers, too." That was explained, correct?

A. Yes.

Q. Okay. Now, because you needed more alder lumber, you actually bought a small sawmill in Reedsport, Oregon, before this meeting up in Federal Way, correct?

A. A few months, yes.

Q. So you actually bought the mill before going up to Federal Way?

A. Yes.

Q. All right. Now, at one point you told Doug Bolton of Northwest Hardwoods that you wanted a meeting to tell Northwest Hardwoods what you were doing because you wanted to continue to buy lumber from them as a customer, correct?

A. Correct.

Q. So, now that we've clarified that, you were the one that actually asked for that meeting?

A. I believe so, yes.

Q. So they didn't summon you up to Federal Way?

A. No.

Q. Okay. Now, a few weeks later you got a call telling you that there was going to be a management meeting, the managers were going to be getting together, and if you'd like to then participate in a discussion with them, at the [Tr. 45] end of that meeting you were invited if you wanted to, correct?

A. I'm not sure that was – I wasn't summoned there.

Q. Correct.

A. But I'm not – that they would like to talk to me also. That's the way I understood it.

Q. You then flew up to Federal Way?

A. Yes.

Q. In a Westwood Industries private plane?

A. Yes.

Q. And it was at this meeting that David Weyerhaeuser made the comment that you've just told us about?

A. Yes.

Q. Okay. Now, I understand what you just told us, that at the time you took it as a threat. After thinking about it for

a week or so, you didn't feel it was so much of a threat; am I correct?

A. Correct.

Q. You heard from your own sales manager, Scott Lilly, "That's just David"?

A. Yes.

Q. Now, within a day or two, you were also told by Northwest Hardwoods, as you've told us, that you were not going to be cut off. They assured you of that, correct?

A. Yes.

[Tr. 46] Q. And, as a matter of fact, as you told us when you got the message from David Weyerhaeuser himself, he left a message for you. I think there were messages going back and forth, and then you spoke live a month later, and it's your recollection that in the message he basically said, "You know, some things were said that shouldn't have been said."

A. Yes.

Q. That's your best paraphrase of what David Weyerhaeuser said to you?

A. Yes.

Q. In essence, he apologized. He didn't say, "I apologize," but, in essence, that's what he was doing?

A. I don't think David Weyerhaeuser apologizes for anything, but that's –

Q. That's as close as he gets?

A. Yes.

Q. Okay. Now, you bought the mill before. Now, when I heard you respond to Mr. Haglund, you said that the mill actually started in June 1998?

A. Yes.

Q. Now, Weyerhaeuser didn't cut you off as a customer, correct?

A. Correct.

Q. They have done a good job supplying your needs?

A. No, I wouldn't – I wouldn't say that. I think they've

* * *

[Tr. 51] REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. You were asked whether you bought a mill. Did you buy a mill or a site in 1997?

A. Technically speaking, it was a mill. It was a mill, but it was a three-man hardwood operation, which we did before we tore all the buildings down except, I believe, a shop. And I didn't consider it a mill that we bought, but it was a mill site. And we did not use any of the equipment or anything that was there.

Q. So you built a new mill from there?

A. Yes.

Q. That carried well into 1998 to complete?

A. Yes.

MR. HAGLUND: Thank you.

THE COURT: That's all the questions that we have. I'll ask you, Mr. Wheeler, to wait until the recess before you retire.

THE WITNESS: Okay.

* * *

[Vol. 2-B (Apr. 9, 2003)] [Testimony of Rodney Buck]

* * *

[Tr. 54] his plans at that point.

Q. Now, in your – I'd like to display on the screens what's been marked as Exhibit 446, and it is in evidence.

(Pause in proceedings.)

BY MR. HAGLUND:

Q. Mr. Buck, are you familiar with this document?

A. Yes, I am.

Q. It's a letter dated September 23, 1999; is that right?

A. Yes.

Q. And it's to the State Forester of the State of Oregon?

A. Yes.

Q. Turning – and it's on Northwest Hardwoods stationery, and it's got the Portland address up here; is that right?

A. Correct.

Q. Now, I'd like to turn to Page 2, and call your attention to the bottom of the letter. Is that your signature, Mr. Buck?

A. Yes, it is.

Q. Did you read this letter at a hearing before the State Forester on September 23, 1999, in Salem?

A. Yes.

Q. Could you describe how it is that this came to be? Did you draft this letter?

A. No, I did not.

Q. Could you explain how it is that you happened to be in [Tr. 55] Salem that day and read this letter into the record?

A. Well, Northwest Hardwoods was interested in getting alder as a substitution species, much the same as cedar was, because they were interested in exporting softwood material, so that was the reason for the meeting that day, to try and get an exemption for alder to be substituted. So the letter was prepared and I saw it when I got there that day.

Q. Now, let me make sure that it's understood here and the record is clear. If Weyerhaeuser were to export softwood like Douglas fir from its tree farms in Oregon, were the rules at the time such that the company would not be able to buy alder logs from State of Oregon forests?

A. Correct.

Q. And so you understood this was an effort to get an exemption from those rules?

A. Correct.

Q. I'd like to call your attention to a sentence that I'll highlight for you. The sentence I've highlighted there, did you read that into the record?

A. Yes, I did.

Q. And it states, "Those logs are estimated to provide about 50 percent of the raw materials for our hardwood mill at Garibaldi and about 34 percent of the raw materials for our hardwood facilities at Coos Bay and Eugene."

Do you remember reading that?

[Tr. 56] A. Yes.

Q. Now, Mr. Buck, did you have any involvement in the statistics that are sited in that paragraph?

A. No.

Q. Did you have any knowledge or understanding about whether those percentages were correct or not?

A. No.

Q. You are the mill manager at Eugene?

A. Correct.

Q. Did you have any responsibility for log procurement?

A. Not straightaway. Just as far as the mill having logs to run and more or less looking at value. And I paid more attention to that side of it, as opposed to exactly where the material was coming from and who it might be – who it might be coming from.

Q. Now, in terms of the way your company, then Weyerhaeuser, was organized, was the resource manager the title for the top log procurement person at Eugene?

A. Well, each facility had a resource manager.

Q. Okay. So Eugene had one?

A. Right.

Q. And was his name Steve Carter?

A. Yes.

Q. Did Mr. Carter report to you or to someone in Federal Way?

* * *

[Tr. 59] any way by the fact that you work for someone other than Weyerhaeuser?

A. No.

MR. HAGLUND: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Buck, you were, in fact, for Northwest Hardwoods, the mill manager for both the Eugene and Garibaldi sawmills, right?

A. Correct.

Q. Okay. And you had worked for Diamond Wood Products prior to working for Northwest Hardwoods?

A. Correct.

Q. And that started that 1988?

A. I worked for them earlier, but –

Q. As the mill manager?

A. Yes.

Q. So as of 1999, when this letter was written, you had been the mill manager at those facilities for about 11 years?

A. Okay.

Q. Now, when you read the testimony – did you read the letter you submitted and read into testimony, did you read it before you signed it?

[Tr. 60] A. Yes.

Q. And when you read it over, did it look reasonable to you?

A. Sure.

Q. You were acting in good faith?

A. Yes.

Q. Okay. Now, after – when you were at the hearing, who was there with you from Northwest Hardwoods?

A. Greg Miller.

Q. Was Steve Carter also there with you?

A. No. I don't recall. I don't think so. He might have been. I don't recall.

Q. Later that day or the next day, you said that Steve Carter was the resource manager.

A. Correct.

Q. Did you say anything to him, that the numbers didn't look reasonable, that something looked off?

A. No.

Q. You were acting in good faith on that day when you read that letter into testimony?

MR. HAGLUND: Objection, asked and answered.

THE COURT: The objection will be sustained.

MR. JOHNSON: Your Honor, now I think we're going to do the same thing we did with Mr. Wheeler. We also had Mr. Buck down as a witness on our witness statement, and I'm [Tr. 61] just going to ask him a few questions.

THE COURT: All right. At this time, Mr. Buck now becomes a witness for the defendant.

BY MR. JOHNSON:

Q. You mentioned Mr. Carter when Mr. Haglund was asking the questions, that he was the resource manager, and what is that position?

A. The resource manager?

Q. Yes.

A. He buys logs.

Q. So he's the person responsible at his sawmill for purchasing logs?

A. Correct.

Q. Okay. Now, where was his office located?

A. Across the hall from me.

Q. So did you have regular conversations with Mr. Carter while you were the mill manager at the Eugene mill?

A. Sure.

Q. Did you talk to him about log sourcing issues, log issues in general?

A. Periodically, yeah.

Q. And, in fact, did you travel with Mr. Carter to visit log suppliers on different occasions?

A. There was a couple of times that we actually visited vendors together.

[Tr. 62] Q. Now, when you were at Northwest Hardwoods, who did you report to?

A. Jerry Martin.

Q. Now, did Mr. Martin, while you were at Northwest Hardwoods, ever tell you that it was the strategy of Northwest Hardwoods to bid up logs to hurt competitors?

A. No.

Q. Did Mr. Martin ever tell you that it was the strategy of Northwest Hardwoods to buy more logs than it needed just so competitors couldn't get logs?

A. No.

Q. Now, you mentioned Mr. Carter, the resource manager. To whom did he report?

A. Del Fisher.

Q. And that's Mr. Fisher who is sitting here?

A. Yes.

Q. Now, did Mr. Carter, in your conversations with him about logs, ever tell you that Mr. Fisher had ever instructed him that he was supposed to go out there and buy logs at high prices to raise the costs of competitors?

A. No.

Q. Did Mr. Carter ever tell you that Mr. Fisher ever told him that he was supposed to buy more logs than he needed just to keep them away from competitors?

A. No.

[Tr. 63] Q. In fact, if such a strategy existed, would you have gone to work for a competitor?

A. Ask me that again?

MR. JOHNSON: I'll withdraw the question.

MR. HAGLUND: Just a couple follow-up questions, Your Honor.

THE COURT: Is that all, Mr. Johnson?

MR. JOHNSON: Yes, it is.

THE COURT: All right. You may redirect.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Buck, who prepared the letter that is Exhibit 446?

A. I'm not sure.

Q. Who presented it to you to sign?

A. Greg Miller.

Q. Who is Mr. Miller?

A. He was in government affairs.

Q. So he is with the department of Weyerhaeuser called government affairs?

A. Yes.

Q. Is he a lobbyist in the Legislature for Weyerhaeuser?

A. I don't know for sure. I know that he spends a lot of time in the Salem area watching basically kind of the political climate to see where things are at, where they're headed.

[Tr. 64] Q. Did Weyerhaeuser get the exemption from the rules?

A. Yes.

Q. Let me just ask you one last question, Mr. Buck. If you had known that the actual statistics, in terms of consumption had been – were – really five or six percent of Eugene's consumption came from State lands, would you have raised a question when you read the letter?

A. Yes.

MR. HAGLUND: Thank you. No further questions.

THE COURT: Further questions?

MR. JOHNSON: One question, Your Honor, or a couple maybe.

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. You said that you had never seen this letter prior to arriving at the Oregon Department of Forestry?

A. Yes.

Q. Do you know if the numbers were actual current numbers or they were future projections?

A. I have no idea.

* * *

[Vol. 2-B (Apr. 9, 2003)] [Testimony of James Harrison]

* * *

[Tr. 65] sir.

JAMES EDWARD HARRISON

Was called as a witness on behalf of the Plaintiffs, was duly sworn and was examined and testified as follows:

THE COURT: State your full name and spell your last name.

THE WITNESS: James Edward Harrison, H-a-r-r-i-s-o-n.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Harrison, do you have – it's my understanding that you have a bachelor of science degree in business administration and economics from Southern Oregon State College in 1981.

And that you then went to work for the family business, Diamond Wood Products, and worked there from '81 through 1995, serving as sales manager and president from '87 through the '95 sale of the company to Weyerhaeuser; is that right?

A. Yes.

Q. Now, were you, sir, involved in the negotiations to sell the company?

A. Yes, I was.

Q. Could you describe over how long a period of time those [Tr. 66] negotiations –

A. It was on and off for about two years, maybe two and a half at the outside.

Q. Who was the negotiator for Weyerhaeuser?

A. Primarily Arnold Curtis and a gentleman named Peter Sills.

Q. Where did these negotiations take place?

A. Some over the phone, but mostly in Eugene at Diamond Wood Products, and in Tacoma – actually, the Weyerhaeuser hangar was the final negotiation.

Q. The Weyerhaeuser hangar?

A. Yeah, airplane hangar in Seattle when we were up there.

Q. And the negotiations occurred over about a two-year time frame?

A. Correct.

Q. Now, at some point in those negotiations, did Mr. Curtis bring what you would characterize as some pressure to bear on you?

A. The only real time that I remember was just the final negotiation.

Q. What happened?

A. Well, it was intense. Basically, Arnold said, "If we don't put a deal together here that we're going to come to Oregon. With or without you, we're coming to Oregon."

Q. And did he explain that any further?

[Tr. 67] A. Basically, he said that, "We have several hundred acres of industrial site in North Bend," I believe is what he said, which is also contiguous to a chip dock or something like that for export.

Q. And what did he explain might happen if the deal didn't get concluded?

A. Just basically that we'd compete head-to-head down here in Oregon.

Q. Did you feel any pressure associated with that in the negotiations?

MR. SIMON: Objection, leading.

THE COURT: Sustained.

BY MR. HAGLUND:

Q. How did it make you feel?

A. I wanted to get the deal done.

Q. Why ultimately did the Harrison family sell Diamond Wood to Weyerhaeuser?

A. Well, we thought the timing was right for us. I had been president and CEO of the company. I suffered – a couple things, one is at that time we were very profitable, and I felt that it was – I thought that we were at the – you know, towards the top end of the profitability of the company.

And, two, is I had had an accident and had broken my neck in three places and was partially paralyzed, and not [Tr. 68] feeling too well. And I guess three is my brother-in-law, Paul Rodenski (ph), basically, we ran the company together, had just come down with cancer probably three months earlier – six months earlier, and we just felt that the timing was right.

Weyerhaeuser was coming to Oregon and they wanted in. I wanted out for various reasons and we wanted to put the thing together.

Q. Was avoiding the competition head-to-head with Weyerhaeuser a factor?

A. Yeah. I was scared to death. I just did not want to face that.

MR. HAGLUND: No further questions.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Harrison, Michael Simon, one of the lawyers for Northwest Hardwoods and Weyerhaeuser.

Your father was involved in these negotiations, wasn't he?

A. Very little directly.

Q. Wasn't your father the one having a number of direct communications with Arnold Curtis?

A. I don't know.

Q. In the year 2001, did you take any steps towards beginning a new alder mill or hardwood lumber mill operation [Tr. 69] in Oregon?

A. Yes.

Q. Tell us what you did, please, in 2001.

A. Well, after 9-11, I had been day trading for five years before that and that became weak trading, and then weaker trading, and after 9-11, with the collapse of what I was doing, frankly, I needed to find something to do, and I had been looking at restaurants and, you know, just different areas to get involved in and came around to – I felt I knew the alder business, the hardwood business, and we just started scouring basically Oregon and Washington looking for – somehow to get involved back in the business in a small way.

Q. And you did get back in the business, correct?

A. Yes, I did.

Q. And what was the name of your business?

A. We made a deal – I made a deal with a company called Tree Source which – and bought a plant called Pacific Softwoods in Philomath, Oregon. We negotiated a deal that – really that started in January. I started looking in 2002. In

January, I found them. They were going to liquidate the plant or find a deal and I negotiated a deal. We signed the agreement February –

Q. I just wanted to know the name of the business, sir.

A. Pacific Softwoods. And now it's Diamond West Lumber [Tr. 70] Company.

Q. Diamond West Lumber Company in Philomath?

A. Correct.

Q. And it cuts alder lumber?

A. Correct.

MR. SIMON: Thank you, sir. Nothing further.

MR. HAGLUND: Your Honor, he inquired about the – there is some information now about Diamond West and 2002. I have a follow-up question.

THE COURT: You may. Is it in your witness statement?

MR. HAGLUND: Yes, it is.

THE COURT: I'll permit you to proceed beyond the cross-examination if it is in the witness statement.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Harrison, has Diamond West encountered any difficulty in the log markets from Weyerhaeuser with Diamond West?

A. As far as competing?

Q. Yes, in terms of access to alder logs?

A. We're getting lots.

Q. Have you run into any situations where there are exclusive arrangements with landowners?

A. Only one that I am aware of personally.

[Tr. 71] Q. Would you describe that, please.

A. In May of 2002, we revamped the mill to be able to cut hardwood, and we were going to start in June, so in May, we started inquiring for logs, and I approached –

MR. SIMON: Objection, Your Honor. This is beyond the scope of the witness statement.

THE COURT: I don't think it is. I am looking at it. The objection's overruled.

THE WITNESS: And basically Hampton Lumber, who I'd done business with for years in advance, I called a guy and I had been talking to him on some other issues, and told him that we wanted to talk about buying some hardwood logs, some alder logs, and he immediately said –

MR. SIMON: Objection, hearsay.

THE COURT: The objection will be overruled, not for necessarily the truth of what the man said, but for the effect it had on this witness.

You may proceed.

THE WITNESS: David Ivanhoff, I believe, is the vice president of Hampton Lumber. And I said I wanted to talk to him about buying alder logs for our sawmill, and he said that that would not be possible. And I asked him why, and he said, "Because if we sell you alder logs, Weyerhaeuser will cut us off of conifer, and you guys are good guys, we've done business in the past, we don't like [Tr. 72] it, but it's matter of self-preservation, and that's that. If anything changes, I'll call you back in the future."

Q. When you referred to conifer volume, is that a reference to trading certain types of softwood logs between Hampton and Weyerhaeuser?

A. I don't know how he meant it other than basically if he sold us alder, they were afraid of getting cut off of conifer logs for their softwood operations.

MR. HAGLUND: Thank you. No further questions.

THE COURT: Further examination?

RECROSS-EXAMINATION

BY MR. SIMON:

Q. Hampton Tree Farm or Hampton logs that you just referred to was one of many different log suppliers, correct?

A. Yes.

MR. SIMON: Your Honor, I have a matter for the Court after this witness is excused.

FURTHER REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Harrison, is Hampton one of the significant forest landowners in Oregon and Washington?

MR. SIMON: Objection, leading.

THE COURT: Objection overruled.

[Tr. 73] BY MR. HAGLUND:

Q. I didn't hear your answer, sir.

A. Does that mean I get to answer that question?

Q. Yes.

A. Yeah, they're a major landowner.

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[Vol. 2-B (Apr. 9, 2003)] [Testimony of Thomas Collet]

* * *

[Tr. 81] Q. Now, did you have a specialty in terms of lumber sales when you were working for Northwest Hardwoods?

A. I started in domestic sales. And then after a period of time, I think less than a year, I moved into international sales and then evolved into heading up their European alder sales.

Q. So you were specializing in alder sales to Europe?

A. Probably 75 percent of what I did was alder, and the rest was from the eastern mills, but it was all Europe.

Q. Now, in terms of the Northwest Hardwoods or Weyerhaeuser alder sales office here in Portland, is that where the sales staff are primarily located for Northwest Hardwoods?

A. At that time, most were.

Q. And do you recall some discussions in 1989 about a problem with stained lumber?

A. Yes. When I started there, I think it was late – I started in late '88, and then some time over the next few months, it could have been '89, I was doing domestic sales. And we had a very large inventory of stained lumber, and I remember asking the question why we had so much stained lumber.

Q. This was some time in 1989?

A. I believe it was 1989.

Q. Now, could you set the scene for what type of meeting [Tr. 82] this was and how this discussion came up?

A. I recall there was a bit of an informal meeting and it would have been Vern Aden's office. And I don't – I can't recall 100 percent who said it, but it was probably Vern who answered the question that I asked, "Well, why do we have

so much stained lumber to sell?" And the answer was that we had bought so many logs and that they had spoiled.

Q. Was this discussion associated with a particular facility?

A. With Longview.

Q. So the question is asked, "Why do we have so much stained lumber?" And the response comes, "It was because we bought too many logs."

Was there further discussion about this topic?

A. The next question was, "Well, why did we buy so many logs?" And the answer was that, "Arnold had said that Longview wasn't big enough for two alder mills," words to the effect, "One had to go and it wouldn't be us."

Q. And to the best of your recollection, who was it that said that?

A. I believe it was Vern, but it could have been anyone in the room at that time. But my recollection is it was Vern Aden.

Q. And who was Vern Aden in connection with the Weyerhaeuser alder sales operation in Portland?

[Tr. 83] A. Vern was the western sales manager. I believe that was his title. And his responsibility was for alder sales and sales of eastern species on the West Coast.

Q. And did he report at that time to Mr. Cliff Chulos?

A. I think in some – for some areas of responsibility, he reported to Cliff, and he might have reported even to Arnold for the alder. I'm not sure exactly.

Q. So you're not sure whether he reported directly to Arnold or to Mr. Curtis?

A. On all things. I know he reported to Cliff on some things, and he might have reported to Arnold on the alder sales.

Q. Now, you used the name Arnold. Who was referred to as Arnold in this decision?

A. Arnold Curtis.

Q. And did you know who the other mill was that had to go in Longview?

A. The only other mill that I was aware of was Ross-Simmons.

MR. HAGLUND: No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Collet, Michael Simon, one of the attorneys for Northwest Hardwoods and Weyerhaeuser. We met back in your

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[Vol. 3-A (Apr. 10, 2003)] [Testimony of Clifford Chulos]

* * *

[Tr. 5] MR. HAGLUND: Plaintiff calls Mr. Cliff Chulos. While he is coming in, I would like to point out to the Court that Delores Pigsley is here today. She is the tribal chair of the Siletz Tribe and the client representative for the tribe for the balance of the trial.

THE COURT: Very good.

(The witness was duly sworn.)

THE WITNESS: Clifford Benjamin Chulos. C-H-U-L-O-S.

THE COURT: All right. You may proceed.

MR. HAGLUND: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Chulos, it is my understanding that you have a bachelor's degree in economics from Portland State that you [Tr. 6] secured in 1963; that you then worked for four years for First Interstate Bank as a junior loan officer; that you then worked for North Pacific Lumber Company for four years until 1971; that you then worked for Burrows Computers selling information systems to lumber companies; that you in one of your sales calls to Weyerhaeuser were, after that sales call, hired by Arnold Curtis to begin work at Northwest Hardwoods in 1973; that at Northwest Hardwoods, you were a salesman for five years until 1977; that you were the sales manager of the division from '78 until sometime in 1992; that you then left Weyerhaeuser and have been the president and one of the owners of North American Wood Products in Oregon from 1992 through the present.

Is that an accurate summary of your educational and work experience?

A. Just two corrections: One would be when I went to work for Weyerhaeuser, it was Northwest Hardwoods. Weyerhaeuser didn't purchase the company until, I believe, about 1980.

The second thing would be I was head of sales until mid-1991. It was mid-1991 that I was demoted, so to speak, put in charge of international sales, but all of the domestic sales people did not report to me.

Q. Okay. Mr. Chulos, are you here today pursuant to a subpoena that was served on you?

A. Yes, I am.

* * *

[Tr. 12] irrelevant in terms of international sales application.

THE COURT: The objection will be sustained.

BY MR. HAGLUND:

Q. Mr. Chulos, I would like to ask you some questions about log procurement. Do you remember any discussions of log procurement among senior managers as it related to competition?

A. Obviously there were a lot of discussions, many of them quite informal as we traveled together in planes, automobiles. Reference was made at some of our formal monthly meetings as to the log supplies. And if you talk about various portions of the business, logs came up quite often. There were times where the issue of whether or not we were being too aggressive and building too many inventories in logs would come up.

Q. Could you describe the discussions about building too large of inventories?

A. We often talked about the fact that obviously we wanted to make sure we had adequate supplies, but there

were times when we got into the discussion that if for some reason we either acquired another sawmill or a sawmill went out of business, that the log prices would drop due to the reduced competition and therefore we could recoup any of these additional charges.

On one occasion in, probably 1991, in the [Tr. 13] summertime, Heinz told me that Juel Sheldon was going to hate him because he was going to raise prices of the logs. I made the comment, I said: Why are we doing this for us because we have done this many times in the past. But another rule of economics comes in. Every time you do, we raise the price. Ross-Simmons raises the price. The loggers respond to the higher prices by supplying a lot more material, and we both end up with inordinate inventories in the fall which are going to spoil, and we're going to have stained lumber to sell.

Q. What was Mr. Hohendorf's response?

A. I had been told to do.

Q. By whom?

A. Arnold.

Q. Arnold Curtis?

A. Right. On a number of occasions throughout the late '80s – Dave McCullum was much more eloquent than I will ever be: Why do we do this because when we do raise the prices, the supply goes up and no one is deprived of logs. We have excess logs, as does the competition.

Q. And when you said the charges would go up, or recouped these charges, were you referring to recoup the additional log cost?

A. Yes.

Q. Were you considered a part of senior management in your [Tr. 14] role as head of sales?

A. Yes.

Q. Approximately how many individuals were in the so-called senior management group during your time?

A. Well, I think that's going to vary with how far down you go. Obviously Arnold was the senior person. Dave McCullum, Heinz Hohendorf, myself. Towards the end the group expanded to include the sawmill managers and obviously the finance person, whether it be Gene Novak, or later Karen was part of the meetings. Sometimes we went down to even a sales manager level, but generally that would be mid-management.

Q. So the senior management generally included Arnold Curtis, the president; Heinz Hohendorf, the VP of operations; yourself; Dave McCullum; and the comptroller being Gene Novak or whoever was in that position?

A. Yes. Yes.

Q. Now, within these senior management meetings, did they occur generally monthly?

A. Yes.

Q. So you would travel to Federal Way for these?

A. Yes. Or oftentimes they were held at one of the sawmills, like it might be in Longview. It might be in Centralia the next month, Arlington the next month instead of Federal Way.

[Tr. 15] Q. Now, at these meetings, was there ever any discussion about Weyerhaeuser's ability to influence price for logs?

A. Any time you buy or are involved in a market of over 50 percent, I think it was taken as a given by everyone that we could influence price; that we had to be a major influence.

Q. As you understood where the market share was in the late '80s, after you had the Longview plant up and running in

'86, what was your understanding and that of the senior management at Weyerhaeuser concerning Northwest Hardwood's market share of the alder saw wood market?

A. That it exceeded 50 percent.

Q. Was it the same percentage as to the market for finished alder products?

A. I am going to assume that, yes. You mentioned sawlogs. And sawlogs, the highest value would be for lumber.

Q. I want to make sure it is not just an assumption. Was it understood that the company had a 50 percent plus market share in the late '80s in both the alder sawlog market as well as the market for finished alder lumber?

A. Yes.

Q. Now, I want to ask you a follow-up question regarding what Mr. Curtis said at some of these meetings where Dave McCullum or others would question the strategy of raising log costs.

[Tr. 16] Is it true, sir, that he said, in effect, if we pay more today and somehow our competition goes away, we can recoup the costs manyfold because the prices of logs will go down when there is less competition?

A. That was stated at meetings and also in private conversations, small conversations with senior managers.

Q. By Mr. Curtis?

A. Yes.

Q. By Mr. Hohendorf?

A. Yes.

Q. So this issue of log pricing came up many times throughout a significant number of these monthly meetings over a period of several years?

A. We are talking a long time ago. I can't tell you how many monthly meetings. It came up a number of times in private conversations.

Q. As well as at meetings?

A. Yes.

Q. Now, when you made a comment – you stated a minute or two ago – I think you said you were in a car with Heinz Hohendorf or on a plane and he told you that Juel was going to hate you. Who were you referring to?

A. Juel Sheldon, the general manager at the Ross-Simmons.

Q. What was your understanding about why Mr. Hohendorf was saying Juel Sheldon would hate him?

[Tr. 17] MR. SIMON: Objection, Your Honor. That calls for speculation from Mr. Hohendorf, the speaker.

THE COURT: To the extent you know, you may testify. The objection is overruled.

THE WITNESS: We were talking about logs – he was going to increase log prices, and we specifically talked about that. I assume we were talking about Juel was going to hate it because we were going to increase the price of logs in Longview.

BY MR. HAGLUND:

Q. Now, were there times when the logs that were purchased by Northwest Hardwoods for its Longview mill were not needed to process at the Longview Weyerhaeuser mill?

A. I suppose that's a matter of opinion of what is enough inventory going into the various seasons of the year. But we had enough experience with losing logs to spoilage in previous years that when we reached – there were certain levels that you could not saw the logs within 60 to 90 days that you

were probably encountering spoilage, especially in the late summer and early fall.

Q. So were there times when it was stated in these meetings that we're buying more logs than we need, and they will stain or spoil?

A. I can't tell you the exact wording, but it was stated in the meetings.

[Tr. 18] Q. And was that – was that done to keep those logs away from competitors? Were the excess inventories built to keep them away from competition?

A. It was – we raised the price of logs when we had adequate supplies, and I don't know that it was actually said: We want to do this to restrain them.

One of the things that we didn't seem to acknowledge was the fact that some of the suppliers would supply our competitors no matter what we did because as much as we like to think of ourselves, there were people who would prefer to either not deal with Weyerhaeuser or prefer to keep more market conditions – open-market conditions for the product.

Q. Now, Mr. Chulos, I know it has been six months since your deposition, and it is hard to remember everything. Let me read a few questions and answers and ask you if you gave these answers to these questions last fall when you were deposed.

MR. SIMON: Your Honor, if this is inconsistent with Mr. Chulos' last answer, I will have no objection, if I get the page and line number. If it is not inconsistent, I will object.

THE COURT: We will have to see.

MR. SIMON: May I have the page and line number.

MR. HAGLUND: Certainly. Page 23, line 20:

[Tr. 19]"QUESTION: Now, at these meetings was it discussed that Weyerhaeuser needed extra logs or additional logs to wood the mills?

"ANSWER: No, we didn't need the logs. It was discussed because we knew they were at risk of staining.

"QUESTION: Now, was it ever discussed that the purpose of buying the logs was to keep logs from competitors?

"ANSWER: Yes.

"QUESTION: Then who made such a statement?

"ANSWER: Arnold."

Do you remember giving those answers to those questions at the deposition?

A. Do I remember making them? No, I don't. But they are essentially true.

Q. Thank you. Regarding Northwest Hardwoods and its operations, do you recall discussions in the late '80s or early '90s that Northwest Hardwoods was somehow immune from the antitrust laws?

A. Yes.

Q. Could you tell the jury about those discussions?

A. Well, it was – it began to come out that if we looked at alder as a hardwood, and if you look at North American hardwoods, alder is less than 3 percent of total supply of hardwoods cut each year in North America. Even though we [Tr. 20] might have 50 percent, or plus, of the alder production, that would translate into less than one and a half percent of hardwood production in North America. Customers always had alternatives, either alternative North American species or possibly imported hardwood species or possibly alternative softwood species.

Q. Were you and other senior managers told by Mr. Curtis to start referring to alder as just a small part of the U.S. hardwood industry?

A. Yes.

Q. And did he explain this in a way where he was at a meeting saying: Folks, we have been looking at this the wrong way. We really don't have any worries if you talk about it, the alder industry, in this fashion? Did he say things to that effect?

A. He said things to that effect.

Q. Did you have the impression that he had legal advice–

MR. SIMON: Objection, Your Honor. Leading.

THE COURT: Objection will be sustained. I am not going to object it on the grounds of leading. I am going to sustain it because of the impression. I think he is entitled to lead this witness. So we won't worry about that.

BY MR. HAGLUND:

Q. I would like to ask you now some questions about [Tr. 21] specific competitors. Do you remember discussions about Ross-Simmons as a competitor?

A. Yes.

Q. Were there discussions about the potential impact of Ross-Simmons – the potential positive impact of Ross-Simmons leaving the marketplace, failing as a company?

A. I don't recall specifically putting the name together. The comment about the advantage was competition in general.

Q. Now, did Weyerhaeuser try to buy Ross-Simmons in the mid-'80s?

A. I can't recall if it was mid-'80s or early '80s, but at some point in that time period, I would say, between 1981 and 1985 we attempted to buy Ross-Simmons.

Q. And that was before the decision was made then to convert a mill in Longview that opened in '86?

A. Yes.

Q. Now, do you remember any discussions about a competitor in Everett, Washington, called Smith Street?

A. Yes.

Q. What do you remember?

A. Well, Smith Street was and is a very small sawmill; put out very high-quality material. But because of their size we never – they did not present a threat in the sales marketplace.

No. 2, it was decided because of their position in

* * *

[Tr. 38] Q. All right. Were you generally aware of the sales activities, both internationally and domestic, for Northwest Hardwoods while you were there through 1992?

A. Yes.

Q. Let's talk about that for a few minutes, and then I will come back to North American Wood Products.

Now, throughout the period of 1980s, from 1981 to 1991, while you were at Northwest Hardwoods, Northwest Hardwoods was selling all of the lumber it could make, correct?

A. Pretty much.

Q. You were sold out?

A. Not all the time.

Q. Most of the time?

A. Most of the time.

Q. Now, you had more demand a lot of the time from customers than the company could fill. Is that correct?

A. Much of the time.

Q. Company was looking to grow?

A. Yes.

Q. In order to serve that customer demand?

A. Yes.

Q. The customer demand was the primary reason why the company was looking to grow, correct?

A. I believe so.

* * *

[Tr. 50] A. Yes.

Q. When did Weyerhaeuser rejoin that organization?

THE COURT: Let's go on. I think we are getting away from the subject here. Let's go on. Any other questions of this witness?

MR. HAGLUND: Yes.

BY MR. HAGLUND:

Q. Have you had any contact with Mr. Novak at all since he left your company in 1995?

A. None whatsoever.

MR. HAGLUND: No further questions.

THE COURT: Any further questions?

MR. SIMON: No, Your Honor.

THE COURT: You may step down.

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[Vol. 3-A (Apr. 10, 2003)]
[Testimony of Mark Rasmussen]

* * *

[Tr. 51] of Science Degree from Utah State in environmental studies with a minor in economics and that you were valedictorian of the college of natural resources.

You obtained a master's degree in forest science/economics from Utah State in 1982.

You worked for the United States Forest Service for three years as an operations research analyst in the early '80s.

You worked for the National Forest Products Association for five years in the mid '80s as a policy and programs analyst.

And then you spent ten years as a forest economist for Timber Data Company in Oregon from 1987 through 1996.

Since '96 you have been with the forestry consulting firm here in Portland called Mason, Bruce and Girard, spending two years as a senior forest analyst and the last four years as a shareholder.

Further, it is my understanding that while at Timber Data Company, beginning in '87 and throughout your forestry consulting work with Mason, Bruce and Girard, that you collect, edit, analyze on a regular basis timber supply and forest industry economics issues and matters.

Is that an accurate summary of your education, background and experience?

A. I think so.

[Tr. 52] Q. Now, Mr. Rasmussen, do you have an opinion concerning whether the market for alder sawlogs is a distinct product market?

A. Yes, I do.

Q. Could you share that opinion.

A. It is my opinion, based on the analysis I have done, that alder logs are in a market by themselves – by themselves here in the Pacific Northwest.

Q. And does the alder sawlog product market have a geography?

A. It is confined to western Oregon and western Washington.

Q. Now, what is the basis of your opinion, sir?

A. Nearly all the logs are found in western Oregon, western Washington, all the alder timber resources there. Those logs are processed at mills in the Northwest. There is a very, very small amount of export to foreign countries and the logs are processed here, and they are processed by hardwood sawmills.

Q. They are processed at specialized mills making hardwood lumber here in the Pacific Northwest?

A. That's right.

Q. Now, Mr. Rasmussen, what, in your opinion, would happen to the alder industry in the Pacific Northwest if the alder timber resource were suddenly off limits?

* * *

[Tr. 55] hardwood logs moving from the East of the United States, east of the Mississippi to the Pacific Northwest for processing here?

A. No.

Q. That's not happening now and you haven't seen it happen in the past?

A. No. It is not happening now, and I have not seen it happening in the past.

MR. HAGLUND: The demonstrative exhibit that was marked as Exhibit 18, Your Honor, I would like to be able to approach the witness as we just had it blown up.

BY MR. HAGLUND:

Q. Mr. Rasmussen, if you could, could you come down from the witness stand and just explain how this map shows slightly different information about the hardwood industry in the United States.

A. Yeah. This map – if you are a forester, you recognize this is where the bulk of the hardwood inventory sits.

Q. You need to speak up, please.

A. The timber in the West is primarily softwood species, conifers, and out here we have lots of conifers but also a lot of hardwood. This map shows the circles and indicate the size. The purple circles --

THE COURT: Put that on the easel here so the court reporter can be listening directly to him.

* * *

[Tr. 58] Washington if alder were off-limits?

A. I'm not aware of any logs that currently come into the Pacific Northwest, hardwood logs for processing in the Northwest mills. Could they come in? Maybe. There would be another big cost disadvantage there or financial disadvantage. That is, first, you have to incur the transportation costs of moving those logs from, say, South America up to the Pacific Northwest.

But, secondly, labor is cheaper outside this country. You would expect to see those logs, if there was a product for the wood making those logs, you would expect more likely to see that those mills would be built in South America and the product would be shipped. It is much cheaper to ship the products than the logs.

Q. So from the standpoint of economics, are hardwood logs from South America or elsewhere overseas, in your opinion, a viable substitute for the loss of the alder resource to come in to substitute for that resource to feed the hardwood industry in the Pacific Northwest?

A. I don't think so. I think if alder were suddenly unava[illegible]e, more likely what you would see is taking people taking the good mills and dismantling them and setting them up somewhere else where there is a resource.

Q. Thank you. You can return to the stand.

I would like to turn now to the lumber market. [Tr. 59] Mr. Rasmussen, do you have an opinion regarding whether the market for finished alder lumber is a distinct product market?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is that it is a distinct market, distinct from other hardwood lumber markets.

Q. Why is it, sir, that you have reached that conclusion?

A. My opinion is based on two analyses that I performed. First, I made an extensive review of the literature to see how people who are in the hardwood lumber business think about the markets. The second thing I have done is a statistical analysis.

Q. Let's take each of those separately. You said that you performed a literature review. What exactly did you do?

A. I tried to find everything that I could that was written about the hardwood lumber business, and I looked for articles written by researchers at universities. The forest service has a number of researchers dedicated to hardwood products and hardwood markets. I looked at the trade journals and I talked to some people.

Q. Now, when you say that you talked to some individuals, what types of people did you talk to?

A. Mostly I was – mostly I followed up with people writing the articles I was reading, asking them for more [Tr. 60] clarification or their opinion about certain things.

Q. Where would you – could you give the categories or types of researchers or industry folks that you talked with?

A. Yeah. As I mentioned, the Forest Service has a number of people who work on researching hardwood issues. There is a set of people I didn't talk to very much. They are the people who worry about the growth and yield of hardwood timber.

But there are also a number of people who are working on and understanding the markets, developing the markets, trying to promote the use of hardwood products both in the U.S. and abroad. So that's one category.

There is similar arrangements at universities. I think Virginia Institute of Technology has a group of people who are doing the same kind of thing, similar kind of thing.

So I talked to those kinds of people. I talked to people who watch the market and write about the market in different trade publications, and I talked to – I guess I talked to a couple of lumber brokers.

Q. Okay. Turning to the literature review. You mentioned you reviewed articles. Could you describe the type of articles and categories that you reviewed.

A. I haven't thought about categorizing them. There is a certain number of articles that are written, as I mentioned, in the trade publications about, you know, what's going on [Tr. 61] in the different hardwood lumber markets. I read some articles. There is a certain set of researchers who every year are trying to say what the total hardwood lumber production

was for the year and how it changed and what products were being made.

I read –

Q. How many articles did you review approximately?

A. Well, it is in my bibliography. More than 100, 120, something like that.

Q. And approximately how much time was devoted to reviewing that literature?

A. Probably three or four weeks spread out over a couple of months.

Q. And what findings or conclusions did you come to based on the literature review and follow-up discussions with researchers and industry participants?

A. The question I w as trying to answer was the question you asked me: Is alder part of – how does alder fit into this larger thing we might call the hardwood lumber market.

I guess what I found is that people in this market and people who are watching hardwood lumber industry don't think of it as one market. They think of it as a collection of markets. If you want to know what the price of hardwood lumber is, you have to be pretty specific. You have to ask about the price by species and by grade.

[Tr. 62] If you look at something that is talking about changes in the market, it is always changes by species and grade. It will say something like select cherry was up again this month and northern hard maple was down. The demand for oak flooring seems to be holding steady. That was last month. They always talk about the market in terms of species and grades or products.

Q. Now, can you give some examples of where you see in the literature discussion of specific species and specific product categories?

A. There are two publications that people look at on a regular basis. There is one called the Hardwood Market Report, and its counterpart is Weekly Hardwood Review. Both of these are published from companies in the East. What they do, they talk to a bunch of people every week and try to peg the price for a number of different hardwood lumber products each week. And then people trading lumber during the week are looking at that to sort of evaluate the trades they are making.

Q. And if one looks at those publications, those two U.S. industry publications that track hardwood prices, they are going to be tracking those prices by species and grade. Is that right?

A. Yeah. Even Hardwood Market Report, which I think has a little bit wider distribution, even breaks it down into [Tr. 63] region of the country. So if I wanted to know the price for high-quality hard maple, I would see three prices: One for the northern region, which I think on this map would be this area that is called glacial and central. Then there is a price for the Appalachian region and a price for the southern region. Those prices might be different.

Q. Is that why, based upon your review, might those prices be different?

A. As I talked to people, what I began to realize – they told me – is that – take maple, for example. The characteristics of the maple lumber produced in one region might be a little different. And if you are making a certain kind of thing, you should be aware of those characteristics and it might have a different value.

Q. Now, do you find alder reported in these two trade industry publications that track hardwood lumber prices?

A. No.

Q. Why is that?

A. Well, alder – it was included in the Weekly Hardwood Review until 1995 and then they dropped it.

Q. Why did they drop it?

MR. SIMON: Objection, foundation.

THE COURT: Objection will be overruled. I will permit him to testify.

THE WITNESS: I asked why they dropped it and when [Tr. 64] they dropped it.

MR. SIMON: Objection. Now, we are hearing related hearsay.

THE COURT: Objection will be overruled. This is an expert testifying based on his survey of the subject. You may proceed.

THE WITNESS: The response from the person there was they saw – they felt like they were reporting prices primarily for one company, and they didn't want – they weren't interested in doing that.

BY MR. HAGLUND:

Q. Was that company Weyerhaeuser?

A. Yes, I assume that was right.

Q. Now, could you give some examples of where a particular species is referenced in a particular application and the dominant species in that application?

A. I mentioned that often we see in the literature – you would see discussion by species and grade. Some of the publications, especially where they are trying to sort of total up what the production was for year, do it by product. For example, flooring is a big use of hardwood lumber. For the most part that's red oak.

Q. And the market is referred to – the market for flooring is generally referred to as the red oak market?

A. If you look in some of the publications, you would see [Tr. 65] actually red oak and maybe flooring is sort of a description of that lumber product.

Q. Okay. Now, what about applications like gymnasium floors?

A. That's maple that would be used for that. Hard maple.

Q. Hard maple as opposed to soft maple?

A. That's right.

Q. That's almost a universal application for most of the gym floors throughout the United States?

A. I think you would be surprised if you saw one that wasn't.

Q. No alder gym floors?

A. Not that I am aware of.

Q. Bowling alleys?

A. Hard maple.

Q. Again, because of its characteristics?

A. That's right.

Q. How about Fender guitars?

A. I play a Fender guitar. I know it is made out of alder.

Q. What, Mr. Rasmussen, did you not find in this literature review that you thought was significant?

A. Well, a lot of my work centers around softwood. So I'm reading the softwood journals and price reports as well. The big one that I think almost everyone reads is called [Tr. 66] Random Lengths published out of Eugene. They report in a similar fashion price for softwood products each week.

Random Lengths has an index. Everyone looks at that first thing. You turn right to the index and get an idea which way the wind was blowing that week. Were prices up? Were prices down? I didn't see – I looked hard. That's what – when I started my statistical analysis, that's what I was looking for, was something that says: Here is the price of hardwood lumber. But it just doesn't exist.

As I got into this further, I saw that it wouldn't make sense to the people involved in that market to create an index like that.

Q. So the tracking that goes on is by species and grade, not as an aggregate industry?

A. That's right.

Q. Now, you mentioned that there were two fundamental bases of your opinion. One was the literature review and the second was a statistical analysis that you did. I would like to turn to the second category.

Could you explain what statistical analysis you did do.

A. We did something called a price correlation analysis.

Q. And that's an economics term?

A. That's right.

[Tr. 67] Q. It is well known in the field of economics?

A. Sure, yes.

Q. And as simply as you can, could you explain what it is?

A. The notion is, in terms of determining markets and whether two products are in the same market, the notion is, if the prices for two products are going in the same direction over time, then you have a good feeling that they are in the same market. If they are moving in opposite directions or

randomly relative to each other, then you don't think they are in the same market.

Q. And is there a way mathematically to derive statistics that help as you look at a price, the prices of two products moving through time, is there a way of mathematically going through a statistical analysis to measure whether they are closely or not closely correlated?

A. Yeah, there is a standard statistical test used in many applications. It is called a correlation coefficient.

Q. And did you perform that type of analysis?

A. Yes, I did.

Q. I would like to put on the screen what's been marked as Exhibit 86. We will deal with a few of these to explain what you have done, and we will try to break it down.

Now, we will zoom up on Exhibit 86 here in stages.

A. I hope so.

Q. Do you have a hard copy there?

[Tr. 68] A. Yeah, I do.

Q. We will eventually be dealing with 85 through 90.

Could you just briefly describe what the columns are here and then we zoom in.

A. Okay. This is a printout of a Microsoft Excel spreadsheet that I made. We can do all this now on a spreadsheet, which is very nice. What you see here – okay, in the upper – if I touch this does that –

Q. If you use your finger and move it, you can be John Madden.

A. I will try that. What you see here, I'm comparing the prices for – it says: Alder SUP 4/4. That means alder superior grade. Weyerhaeuser has a number of grades that it uses

to – when it sells its lumber. Superior is the highest grade. This is the highest priced grade.

4/4 – I am sorry – four-quarter. This means that this lumber is four-quarters of an inch thick, which means it is 1 inch thick. Alder lumber and a lot of hardwood lumbers is sold in different thicknesses. Four-quarters is a very common one.

I'm comparing alder superior four-quarters to Appalachian four-quarters FAS, which means first and second. This is the highest grade used by the companies that make eastern hardwood. They have a grading system different from alder. FAS is the highest grade there.

[Tr. 69] Hard maple. That's a certain group of maple species. As we talked about before, they have a high density. They are used for things like gym floors and bowling alleys and furniture, things like that.

Q. And the alder sup. which you said stands for superior, is that the Weyerhaeuser top grade?

A. Yes, that's the top grade.

Q. You are comparing the top grade of the Weyerhaeuser alder lumber production with the top grade in the Appalachian hard maple?

A. That's right. There are two other things to notice here, the unsel – that means unselected – apparently a lot of hardwood maple, even in this higher grade goes through another selection process where they sort out the better pieces. This is the price for the group that hasn't been sorted through.

Then the KD means kiln dried. All of the alder finished lumber that is sold is kiln dried. Some of the eastern hardwood lumber that is sold is kiln dried. A lot of it is sold rough and green, meaning it hasn't been planed and it hasn't been dried.

Of all the prices that I might find, this is the hard maple that is most closely – the kind of hard maple lumber that is closely analogous to the alder lumber.

Q. Because it is the highest grade of the hard maple [Tr. 70] compared to the highest grade of the predominant producer of finished alder lumber at Weyerhaeuser?

A. That's right. And they are both kiln dried.

Q. Now, can you explain what these columns of data show.

A. Yeah. First, let's look here. This is the monthly price of the alder lumber. This was data provided by Weyerhaeuser through their expert, and Mr. Simon, I guess, got it for us.

So this is the monthly price per thousand board feet. You see in June, 1990, Weyerhaeuser sold some alder superior four-quarter, and the average price was $1,041 per thousand board feet. All these prices are per thousand board feet.

Q. And your comparison here – we won't zoom back – but you have ten years worth of the pricing data for these two different species of hardwood?

A. I think it is actually 11 years or 10 and a half years. It goes from June, 1990, down to December of 2000.

Q. And it is monthly prices?

A. Yeah.

Q. Traveling through that 10 and a half time frame?

A. That's right.

Q. All right. Go ahead.

A. The next column is the Appalachian hardwood – the Appalachian hard maple price. You will see that down below [Tr. 71] here. So that's the fundamental data that this

analysis is based on. From there we manipulate that data to give us the correlations that we want to know about.

Q. Now, what's the first step that you did in connection with this statistical analysis that you called a price correlation analysis?

A. The first thing – can you move this over now so I can see the graph?

Q. Certainly.

A. Okay. The first thing I did was to graph these out and just get a feeling for how they look compared to each other. You can see here – you can turn those off?

Q. I will do that for you.

A. So you can see that there is some similarities and some differences. You can see that both of these are trending up over time. You can see that they both have a little bit of a dip in this area here and a flat spot and some kind of recovery here.

You see some differences as well. It looks like the hard maple had a really good run in this period here whereas the alder, while it was going up, was trending up more slowly. So the first thing that I always like to do when I get some data is graph it out and see what I see.

Q. Then what do you do?

A. Well, then I calculated a correlation coefficient. [Tr. 72] With a spreadsheet, now it is very easy. I just have to identify the range of the data, the two columns I'm interested in, and put in a formula and it bangs it right out for me.

The correlation coefficient for these two species – these two price trends or these two price series is .965.

Q. Is that a high correlation?

A. I guess I should tell you a little bit about the correlation coefficient. If two prices are moving exactly in tandem, the statistics would be 1.0. If two prices were moving always opposite, the number – you would say they have inverse correlation, perfect inverse correlation, then the statistics would be minus 1.0. If they are moving randomly against each other, then you have zero. You say there is no correlation.

This first calculation gives us 965, very close to 1. And you say, you know, if you stop right there, you say they are correlated. They are in the same market.

Q. But do you stop right there?

A. No.

Q. Let me show you the second graph that is immediately below the first one that you talked about and ask you to describe what you see here.

A. You have to be careful with the correlation coefficient [Tr. 73] because of the mathematics behind it. It can be – it can give you a false positive if both of the series are trending at the same time. Because what we're really interested in here is how these things are moving from period to period. And if they are both trending up, the way the correlation coefficient is calculated, it can give you a false positive, I guess, is the best way to call it.

Q. Let me stop you right there. I want to ask a question here, too, regarding this. So, in other words, if I'm simply doing the first step that you have discussed here that was shown on this graph, if I were only to try and measure whether alder in a given month went up and Appalachian hard maple went up, if they both went up in that month, is the correlation a perfect 1.0?

A. You calculate the correlation over a period of time. If they both went up together every month or they both went down or they're tracking completely, then it would be a 1.0.

Q. This shows the limits of my questioning ability with this kind of stuff.

A. We have been over your limits here before.

Q. If then you take a year and in that year alder is going up at – is going up the entire year, alder superior and Appalachian hard maple is also going up in the same year, you would have a 1.0 correlation?

A. If they were going up at exactly the same rate, it

* * *

[Tr. 83] THE COURT: All right. You may proceed,

Mr. Haglund.

MR. HAGLUND: Thank you, Your Honor.

BY MR. HAGLUND:

Q. Mr. Rasmussen, you talked about the first stage. What were you trying to examine in the second step of this price correlation analysis?

A. As I mentioned, what we are really interested in is how these prices are changing from month to month relative to each other. If you can – can you move over to the left on this sheet a little bit.

Q. Sure.

A. Just a little bit farther, if you would. That's good.

In these two columns here what I have done is calculated the monthly price change for each series. You see the $6 here is the difference between the 1,047 and 1,041 for the alder. And you can see the Appalachian hard maple went down $10 in that month while the alder was going up $6.

The economists refer to this as the first difference. It is simply a change from one period to the next. So now move over to the graph we were looking at before, please.

Q. Okay.

A. So what I have done here is simply graph out those [Tr. 84] periodic changes, those first differences. You can look here, this is zero. If there is no change in a month, the line would be along here.

So what you see, look right here, for example, the hard maple in this month went down $40. At the same time, the alder went up a few bucks. Over here the hard maple went up, it looks like almost 70 bucks, and in that same month – it is hard to tell here because I have all these months squished together – but the alder was either unchanged or went down slightly or maybe up slightly. I can't see how it was lining up there.

So, anyhow, you can take a look at this graph and say, well, maybe they are not tracking each other as tightly as you might think. So what I can do then is simply run that same calculation of the correlation coefficient on these first differences. That's what I show up in the upper left-hand corner of this sheet right here.

So when we did it on the series, just the prices by themselves, we got a .965. When we do it on the first differences, it is .276.

Q. And what kind of a correlation is .276?

A. .276 is much closer to zero than it is to 1. Zero is no correlation. 1 is perfect correlation.

Q. So overall when you look at all of this information, what does it tell you about the price correlation between [Tr. 85] Appalachian hard maple and alder superior lumber?

A. Well, this tells me that .276 suggests to me that these two series, while they are both trending up at the same time, they are not moving together. They are not very closely correlated.

Q. What does that indicate in the way the two products operate?

A. Well, the notion, as I said, is if two products are in the same market, their prices would be moving together. So the conclusion is if the prices aren't moving together, then they are not in the same market.

Q. Is that what this shows?

A. Yeah. I would say that suggests it.

Q. Let's move to another example here. This is a comparison of what species?

A. This is alder again. This is the same grade against red oak from the northern region. Again, FAS being the highest quality of red oak.

Q. Again, it is the Weyerhaeuser superior lumber monthly price data?

A. That's right. In all these we look at it is always the same alder price series.

Q. It is the same 10 and a half year period?

A. That's right.

Q. Let's look at the graph. What does it show?

[Tr. 86] A. Same kind of thing. Both are sort of generally trending up at the same time.

Q. And the correlation based upon that first test shows what?

A. .9, which suggests that there is good correlation there.

Q. And when you do the first differences analysis, and it is displayed in the second graph as Exhibit 87, what do we see?

A. Same thing as before. They are not moving at the same time in the same direction for the most part.

Q. And did you do another calculation?

A. Yeah. It is in the same place up there, .221.

Q. Which is a low correlation?

A. That's right.

Q. Okay. Let's do one more. This is Exhibit 88. This is – what did you compare here?

A. This is cherry. Cherry is interesting because cherry is the species – this high grade cherry is the species and grade that always has the highest price. This is the primo, the best hardwood lumber, the most valuable hardwood lumber that is produced. You can see that there. It trends up sharply over this time period.

Again, this is the same series here for the alder. It looks a little different because the scale of the graph [Tr. 87] changes to accommodate the high price for cherry.

Q. When you do the first – the second stage of this analysis, the first differences, what does it show?

A. Again, it doesn't show very close correlation there. The other thing you notice here is that cherry – the red line is almost always above zero. Cherry is almost always going up. Just a few time periods here where it went down.

Q. And when we move back to the correlation coefficient that you developed, what correlation does it show?

A. It shows .059, which is very close to zero, which means no correlation.

Q. So in this instance, it is so low in your opinion that it means no correlation?

A. Sure.

Q. What does that mean about the markets for Appalachian cherry versus alder superior?

A. Well, given this approach to thinking about how the markets are related, you would have to conclude that they are not related; they are not the same market.

Q. Did you do this same analysis for all of the hardwood species in the East that the data was provided for?

A. Yeah, what I'm doing here is following the process that Weyerhaeuser's expert did. He did this for 17 different species, eastern hardwood species, the highest grade on 17 species. I replicated that analysis for each of those [Tr. 88] species.

Q. Okay. Now, what is Exhibit 85? This is 85A.

A. Can you zoom in a little bit more there? This is called – I'm going to have to get some air sick pills here.

Q. Could you explain what 85A is.

A. This is a correlation matrix. One way to do this is – you can set up the computer to say: Show me the correlation between all of these species. So I had the 17 species plus alder plus also an average of the 17 species that Weyerhaeuser's expert looked at.

So I set up the computer to calculate correlation between each and every one of these. So we have this big table. For example, let's see, we looked at alder as it related to Appalachian hard maple right there. That was the .28. Here is the cherry. I rounded it here to .06.

I could also ask how is this Appalachian hard maple related to each of the other species. Well, to itself it has perfect correlation. That's good. That's what you would expect. You could scan down this column here to see what it's most likely – what it is most closely related to, and maybe not surprisingly, it is most closely related to northern hard maple.

Q. And you are pointing out the – could you point it out.

A. Right here. That 0.85. Okay. So we have this matrix here where you can ask – you can make the comparison for [Tr. 89] any and all of these pairs – I don't want to say that. I can look here and see the correlation between any two price series in this table. This is the table as I set it up here so we can see all the alder here in one column here.

Q. And is it your opinion that you would have thought you – that you would have expected to see a fairly high correlation between northern hard maple at .85 relative to Appalachian hard maple?

A. From one standpoint you think they are both hard maple; they are both selling into the same market. It is interesting, as I said before, that when you talk to people, they think that there is some kind of distinction between the hard maple from one part of the country and the hard maple from another. That's why you don't have a perfect correlation here.

Q. What does this column right here, where you compare alder with each of these 17 hardwoods, what does this column tell you about the markets?

A. Well, when I scan down through here, I see that the highest number I get is 0.33. The lowest is with the cherry, .06. That's not a very big number. It makes me question how closely the prices are correlating.

Q. Does this column suggest relative price independence of alder from these other hardwood species?

A. I guess that would be a good way to say it.

[Tr. 90] MR. HAGLUND: Your Honor, this is a table that includes all of the data that was run in a summary form by Mr. Rasmussen and is just not for demonstrative. We move for the entry of 85A.

THE COURT: Any objection?

MR. SIMON: Can we have the ruling reserved on expert demonstratives until some later time so we can talk about it further and more arguments.

THE COURT: The problem is, with a lengthy trial like this, I like to keep them as current as we possibly can. What's your specific objection on this exhibit?

MR. SIMON: That the methodology used by this witness regarding its first differences analysis is not generally and appropriately accepted in the field of economic analysis. We will show that with our expert, Dr. Randall Pozdena.

THE COURT: All right. I will leave that as a fact issue to be determined by the jury. I will receive 85A. Is it 85A?

(Exhibit 85 was received.)

MR. HAGLUND: That's correct, Your Honor.

THE COURT: We only have 85.

MR. HAGLUND: I apologize. I provided counsel with that. Here is 85A.

BY MR. HAGLUND:

* * *

[Tr. 98] THE WITNESS: So what I was asked to do here was to figure out how much of the alder harvested from state lands could conceivably – well, how would I say this? The question was: If all of the alder harvested from the state lands was delivered to Garibaldi, for example, what percentage of Garibaldi's resource use in that year would that account for?

So I found that Garibaldi consumed about 16.2 million board feet of alder in 1996. The state harvest from those three districts, the districts up by, in and around Garibaldi, was three and a half million board feet. So if Garibaldi received all of that, then that would have accounted for 21.6 percent of the wood used by Garibaldi in 1996.

BY MR. HAGLUND:

Q. And then you show all of the percentages for each year tied exactly to their actual consumption?

A. That's right.

Q. Now, what does the second table show?

A. The second table is similar. I'm now looking at the Eugene mill. I'm looking at the Oregon Department of Forestry districts that are closer to Eugene with the assumption being that if alder was – if any of the alder from state lands came to Eugene, it would be the alder that was closer to Eugene than Garibaldi, and I performed the [Tr. 99] same calculations over here on the far right column.

Q. So in those years, given the consumption in this column, which is actual consumption, if all of the alder harvested from state lands according to their records that were in the area/tributary to Eugene, the percentage of the mills' consumption in those years was in this column?

A. Again, you have got to emphasize that assumption. I don't know how much of it was delivered to Eugene. This assumes that all of it was delivered to Eugene.

Q. Then in the lowest table there, is that a combined?

A. Now, I'm summing it up. I'm summing up all of Eugene and Garibaldi's mill consumption and all the alder harvested and calculating a percentage there.

Q. Okay. Then very quickly did you also prepare a couple of graphs or charts that displayed the –

A. That just makes a picture of the column we just looked at. This is – each bar shows the volume of wood of logs consumed at Garibaldi. The red line is the volume of state – the volume of alder harvested from state lands.

THE COURT: The record should show that he is referring to Exhibit 105.

MR. SIMON: May I ask which table figure it is, Your Honor, from his report. I found it. I apologize. Thank you.

BY MR. HAGLUND:

[Tr. 100] Q. Then did you do the same thing for Eugene in Exhibit 106?

A. Yes. That's what you see there. Same thing.

Q. Now, turning to another subject –

THE COURT: Any objection to 105 and 106?

MR. SIMON: No objection.

THE COURT: They will be received.

(Exhibits 105 and 106 were received.)

BY MR. HAGLUND:

Q. Mr. Rasmussen, I would like to put Exhibit 94 on the screen, blow it up and ask you what it is and ask you if you have any questions.

A. We obtained from Weyerhaeuser a report that shows the volume and price of lumber sold by grade each month each year. This wasn't mill by mill. This was companywide. What we noticed there, there are lots of grades that Weyerhaeuser uses when it sells its lumber.

What I wanted to do here was first list all the grades. But what caught my eye about that, in the eastern lumber, eastern hardwood market, there are four standard grades. With what you see here, there are many, many.

I have forgotten the total; 50, 60, something like that. What I was trying to do here is show how often this grade was used because it was clear that not all grades were used all the time.

* * *

[Tr. 104] logs. That's the log yard. And what we're looking at here is how much volume sits in that log yard at the end of each month. What I did, I graph out those inventory volumes for each of the mills and log yards.

Q. Is the green line shown here the Longview mill?

A. The green is Longview.

Q. Now, what did you observe as a forest economist regarding the inventory levels at Longview?

A. Well, the first thing that I came to here was that Longview seems to be way high in some years. They have really high inventory in some years, especially compared to the other mills. If you look more closely, it is a little hard to see here. You can see most of the mills have some kind of annual pattern here, typically have a little more volume in the log yard in the winter than they do in the summer. But Longview stands out at least in these years in that respect. If you look down here, you see that it is not standing out.

Q. Now looking at Exhibit 99 -

A. That's good.

Q. – does that take the other mills out and show Longview only?

A. That's right.

Q. And in calling your attention to '89 and '93, did those–

[Tr. 105] A. You have '94 there.

Q. In '93 heading into '94.

A. You're right. This is January of '94 right here.

Q. Okay.

A. Okay.

Q. Did those inventories start to build in the summer?

A. Yeah, they did.

Q. What's your assessment of that strategy in the alder business?

A. Well, in alder you have to worry about stain. When you cut an alder tree down, if it is warm out immediately there is an organism that gets into the wood and begins to turn it to stain to red. That, in alder, is not a desirable feature. It is a very undesirable feature and reduces the value of the lumber you can make.

So you have to be careful when the weather is warm, especially you have to be careful that logs don't sit around for long. The longer they sit, the more stain they will have.

Q. You reviewed the expert witness disclosures of Mr. Nelson?

A. Yes.

Q. Do you know of any business reason to build these kinds of inventory through the summer months?

A. Mr. Nelson suggested that was done to put pressure on [Tr. 106] Longview's competitor at Ross-Simmons. It seems like a reasonable explanation for that.

Q. Okay. Now, Mr. Rasmussen, I would like to put on the screen what's marked as Exhibit 97. Did you prepare this?

A. Yes, I did.

Q. What does it show?

A. This is a comparison between alder log prices and conifer log prices in western Washington from 1992 through 2001.

Q. Could you describe what it shows.

A. It shows a couple of things. The dramatic story here at the beginning is this big spike in softwood log – softwood

log prices, conifer log prices in 1993. Prices took a huge spike up in 1993 and have been drifting gently downward ever since. I don't know if I can draw on that or not. But you can see prices trending down since 1993.

Alder, on the other hand, looks to me like it has been trending up through that period for the most part. You can break this into smaller segments, and I think that it was trending up at a steeper rate for some time and that trend leveled out and started rising again.

Q. And what's the red show?

A. That's the alder, the price for alder.

Q. Okay. Thank you. Now, is there anything that you found curious about the graph here?

[Tr. 107] A. Well, what caught my eye, when I prepared this, as we study alder and talk about alder, there is a lot of discussion about it being a come-along species. Do you want me to explain come-along? Has that been discussed?

Q. I don't think there has been a witness yet. The lawyers described it. Could you describe what that means.

A. The notion is that most of the alder these days is found mixed in with conifer stands in various percentages but usually in a minor percentage. That for many, many years, the alder has been thought of as a problem that you have to deal with when you take the conifer out. The focus on the harvest and the management of a piece of ground has typically been on the conifer.

Lots of people in the industry refer to alder as a come-along species. What struck me here is if it is coming along, and for many years you would find alder at a very low price. I don't have prices past 1992. Maybe I should explain that. Or prior to 1992.

These prices come from – they are published by timber data companies as well as the Washington log market report.

If you are interested in information about log prices, what you find is you get, just like hardwood lumber, you get prices by species and by grade and by region.

This service is unique in that they try to put together an index so that you can in one place understand [Tr. 108] how the market is moving.

If you were to stretch this back out, what you would see is that alder prices being at a relatively low level, not changing very much, sort of consistent with this notion that it is just a price that you get for the alder logs as they come along with the conifer harvest.

That all began to change here in, say, 1994 or so where the prices began to accelerate where now this 12-inch alder is bringing more than – the index for that is higher than the index for the domestic conifer.

Q. Now, turning to Exhibit 96. Did you prepare this exhibit as well?

A. Yes, I did.

Q. Does it show the actual harvest of hardwood in Oregon and Washington?

A. That's right. This is data that we saw before reported by the state of Washington and similar data reported by the state of Oregon. This is for harvest from all ownerships.

Q. Which is which in terms of the states?

A. The green is Washington and the red is Oregon.

Q. Okay. If we zoom up and look at particularly the period of the mid '90s through 2000, what does the graph show?

A. Well, what this graph looks to me is that you have a relatively constant level of harvest through this period [Tr. 109] from 1995 through 2000.

Q. So stable supply?

A. Yeah, stable supply.

Q. This is what is harvested as opposed to what's standing in the woods?

A. That's right.

Q. Now, turning to what's been marked as Exhibit 81A, did you prepare this graph as well, Mr. Rasmussen?

A. Yes, I did.

Q. And it has got several layers. Would you please take the Court and the jury through these layers, and then we will focus on particular periods and then zoom on a little bit.

A. Okay. There is four different time series on this graph, and I'm using two different axes so it might look a little formidable at the beginning here.

The blue bar, let's start with that. The blue bar is the western hardwood production. That's how much hardwood lumber is being produced each year according to the Bureau of Census. The scale for that is on the left side here.

So you would see here in, say, 1994 it looks like there was about 450 million board feet of hardwood lumber produced in the West. As we said before that's primarily alder.

[Tr. 110] The green line – I'm sorry – the green bar for each year shows the volume of lumber sales reported by Northwest Hardwoods. So this is how much hardwood Northwest Hardwoods sold each year.

Q. Is that from their alder sawmills in Oregon and Washington during this time frame?

A. Good point. That is exactly what it is.

Q. Okay. And what does – if you look at those two bar graphs in combination, what do they tell you about what is happening in the industry?

A. Well, they show – if you compare them, you can see – 1981 is where Northwest – is where Weyerhaeuser first acquired Northwest Hardwoods and you see it is a relatively minor percentage of the total hardwood lumber production.

As time goes on and those mills produce more lumber and as Weyerhaeuser buys more mills, you see by the time we get out here, there is a relative – out to 2001 – that Northwest Hardwoods has a relatively large share of the Pacific Northwest's hardwood lumber production.

Q. Okay. Now, what does the red line with the red square show?

A. The two lines have to do with prices, and the price axis is on the right side here. So this, for example, is $600 per thousand board feet and this is a hundred dollars per thousand board feet. The red line is the average price [Tr. 111] that Weyerhaeuser received for the hardwood lumber sold each year.

Q. And this is from Weyerhaeuser data the average price per thousand board feet for all of their alder or all of their hardwood sales from their Oregon, Washington mills in the given year at an average?

A. That's right.

Q. And what des the black line with the triangle show?

A. The black line is the average price that Weyerhaeuser paid for the logs used each year. So this is their log costs.

Q. Now, in your opinion, Mr. Rasmussen, as a forest economist, what relationship is there generally between the lumber market and the log market in a given wood product market?

A. We always think that logs follow lumber.

Q. Could you explain why you say that.

A. Logs account for the major cost of manufacturing lumber. It used to be we think it was somewhere around 60 percent of the cost of lumber was what you paid for the log. I went to a thing the other day where the softwood guy told me it was 85 percent now.

So when the price of lumber goes up and there is competition in the market, then the mills can afford to pay more for the logs and the log prices go up. When the price [Tr. 112] of lumber goes down, the mills have to pay less for logs and the price of logs goes down.

Q. Now calling your attention to the period from 1981 through 1997, do you see that relationship, logs following lumber, in evidence in this chart?

A. Actually you might extend out to 1998. Between '97 and '98, lumber prices fell and log prices fell. But generally there is a pretty consistent relationship, generally consistent relationship between log prices and lumber prices during that time period.

Q. What about this '98 through 2000 time frame? What do you see?

A. What I see here is something that we don't see very often. That is, we see lumber prices falling or holding steady and log prices increasing.

Q. When you look at the period of '96 through 2000 and go back to Exhibit 96, was there anything in the log supply market, '98 through 2000, that would be consistent with that situation?

A. The supply was constant. In fact, you might look at it and think there was a slight increase there.

Q. Okay. Now, I would like to turn to some issues related to some other materials that you reviewed. Did you review – and there should be a juror notebook on your table there.

* * *

[Tr. 116] A. What it shows is the allocation through much of the '90s had been somewhere around 5 percent, it looks like. I don't know if it was established that way, but that's how it worked out. In 2000, those allocations were cut back; in 2001 they went away completely.

During this period in here, if I remember the totals right, Northwest Hardwood was returning somewhere around, annually somewhere around 8- or 9- or $10 million back to Weyerhaeuser to cover the cost of selling and overhead, and that went away.

Q. It was dramatically reduced in 2000 and went away in '01?

A. That's right.

Q. Mr. Rasmussen, I just would like to put on the screen, and Mr. Nelson testified about this. Actually that's the wrong one. I will use it as an example. 114 is a charting of what?

A. We received from Weyerhaeuser data about the logs that came into each mill each month. We got that in two forms. This comes from a summary form which shows the volume of logs by each sort, which is how we talk about grade and how we talk about logs and diameter.

This is for the high sorts. This is for the higher quality logs. What we are showing is average prices month by month. What you are seeing here is a line for each [Tr. 117] size class. The lower prices are for the smaller logs, the 1 to 5-inch logs.

What that means, 1 to 5-inch, when we talk about logs, when you talk about the size of the log, it is always the diameter at the small end of the log. You might have 5 inches at the top. By the time you get down to the butt of the log it is larger. In fact, it should always be larger.

Q. Mr. Nelson discussed one of these for Longview and talked about a change in the gap between the lowest price, smallest diameter logs and the highest price at Longview. Did you prepare that graph as well?

A. Yeah. We prepared graphs like this for each mill and each sort.

Q. Now, I would like to turn to a different topic. Did you perform some analysis of some different scenarios designed to establish or try to present what might have happened in the alder log market if certain corrections are made for alleged behavior by Weyerhaeuser?

A. Yes, I did.

Q. I would like to display Exhibit 126 and ask you – what did you do?

A. As I mentioned before, I took Mr. Novak's – the data found on his sheets and made a spreadsheet. Then I was able to – I built the spreadsheet to help me calculate, not only [Tr. 118] what the margins were, but what log prices would have been in order to meet certain margins.

Q. Now, there are three scenarios. Is that right?

A. Right.

Q. In scenario A, did you use information from Mr. Novak regarding a $20 million reduction in log costs?

A. Yeah, I did.

Q. And you gained that information from reading his deposition?

A. That's right. He said something about thinking that profits were $20 million a year less than they might have been.

Q. And is that – let me zoom in here to scenario A. How did you use that $20 million figure that Mr. Novak talked about?

A. Well, this one was relatively straightforward. I said: Okay, if Mr. Novak is right and profits could have been $20 million higher, then let's assume that – that log costs would have been $20 million less. So I divided that 20 million by the volume of logs processed each year and came up with this average price per thousand that you see in that column there.

Q. So it varies depending upon their consumption from $89 and a thousand in 1988 to $84 in 2001?

A. That's right.

[Tr. 119] Q. Now, scenarios B and C were derived differently. Can you describe the process or approach generally?

A. In B and C the notion was – another way to ask the question: What would log prices have been, assuming Weyerhaeuser has the ability to influence log prices, what would log prices have been if the target had been to maintain the average profit ratio for the 1991 through '95 period or the 1986 through '95 period? That's a difference between B and C.

Off the top of my head – I forget which is B and which is C. I guess I could find that in my report. If you want me to look that up. Probably makes a difference, doesn't it?

Q. I think that B is the ten year – I will check that in a second. Let me ask you a question.

A. Okay.

Q. In deriving either of these averages, did you include all of the Northwest Hardwoods alder sawmills?

A. No. For the target profit percentage, I used all the mills except for Longview.

Q. Why was that?

A. As we saw on our previous graph, Longview would seem to be lower than standard profit for a Weyerhaeuser mill, so I felt like – and in listening to Bill Nelson's – reading his deposition, it also sounded like Longview may have been [Tr. 120] pushing the log market up for years prior to 1995 or '96. So I felt it was prudent to drop Longview out of that calculation.

Q. I looked at your report, Mr. Rasmussen. Let me represent to you that scenario B is the ten-year average profit for the Weyerhaeuser alder mills excluding Longview between '86 and '95.

A. Okay.

Q. So based on that representation, could you explain specifically what you did to develop the numbers that are in this column regarding reduced log costs?

A. All right. I made a spreadsheet that looks identical to exhibit – I think it was 414 which summed everything up for all the mills except Longview.

By doing that, I was able to calculate easily not only the log consumption and the average log price, but also the average profit for those years – for each year.

Q. So what was the average profit for the Weyerhaeuser mills, alder sawmills, except Longview during that ten-year period?

A. You know, I don't know that that's in my report. Let me look here and see. Oh, I'm sorry, it is. This is on Exhibit B of my report. The average profit for that ten-year period was 17 and a half percent. So then what I did is I calculated the difference between the profit, the [Tr. 121] average profit for each year, and the average – and this ten-year average.

And so once I knew the percent, I could figure out what the dollar difference is and then I divided that dollar difference by the volume of logs consumed that year.

So what I found is that to hit a 17 and a half percent profit in 1997, that could have been done if the average log prices – if the average log price was reduced by $17. In 1998, you would have to reduce it by $58. By the time you get to 2000, you would have to reduce it by $135.

Q. If the Weyerhaeuser mills, excluding Longview, needed to – were to maintain that historic level of profitability in 2000, their log prices should have been $135 per thousand less?

A. That's right.

Q. Okay. Very quickly then, if we look at scenario C, what type of historic time frame did you use?

A. This is the same process. The historic time frame was '91 through '95, which was on average a little bit more profitable, 18.1 percent.

Q. So the difference between B and C, this one is 17.5 and C is 18. what?

A. 18.1.

Q. Then Mr. Nelson testified how those numbers were used

* * *

[Tr. 133] Agree or disagree?

A. Generally agree.

Q. "Additional mills may implement these processes if they appear profitable while other mills cannot or will not adopt them."

Agree or disagree?

A. Are you trying to describe the behavior of many, many people? Generally agreed.

Q. "When periodic downturns in the lumber market occur, many less efficient mills are forced out of the market."

Agree or disagree?

A. Agree.

Q. "When subsequent increases in price occur, the efficient mills remaining vigorously compete for stumpage, quickly erasing any short-term profits gained by new technologies or marketing methods."

Agree or disagree?

A. That's generally true.

Q. "Each time this happens, the stumpage lumber market margin decreases."

Agree or disagree?

A. Is there a third choice like, sometimes yes; sometimes no?

Q. Yes.

A. Sometimes I agree and sometimes I don't.

* * *

[Tr. 138] A. Same guy.

Q. Title of the article: Are Hardwood Markets Changing?

A. Right.

MR. HAGLUND: Objection, Your Honor. 2002 is beyond the scope.

MR. SIMON: Your Honor, the relevant portions I'm going to read to him do not include 2002 data. He is looking back historically.

THE COURT: That's fine. I will overrule the objection.

BY MR. SIMON:

Q. Do you see in the first column where it talks about how bad was the downturn this time?

A. Yes.

Q. By the way, you are familiar, are you not, with the Asian economic crisis that took place beginning in 1997. You are familiar with that?

A. The Asian flu is what we call it, yeah.

Q. You want to call it the flu. Are you aware that Ross-Simmons documents refer to it as an Asian economic crisis?

A. No, I don't. In the industry we call it the Asian flu.

Q. You can call it that. I will call it based on what the Ross-Simmons documents say.

A. Okay.

[Tr. 139] Q. But you are familiar with it?

A. Yes.

Q. The first paragraph under that heading reads: "As in past recessions, hardwood lumber producers have suffered through more than a year of poor or negative profits brought on by declining lumber prices, low volume of shipments and high stumpage prices."

Agree or disagree?

A. Well, I'm going to agree that Mr. Luppold knows about profits that I don't know about. I don't know what profits are outside what I have read.

Q. Looking at the second-to-last sentence in that paragraph: "The reduction in demand and price brought on by these changes cause lumber production to decline as sawmills shut down or reduced hours."

Agree or disagree?

A. What time period is he talking about?

Q. Talking about – why don't you – why don't you read it to yourself. I don't want to characterize it.

A. It says, "Lumber shipments and prices fell during 2001." Let me look at my report because I had some statistics about 2001. My recollection is that hardwood lumber production increased in 2001.

THE COURT: In the article, in 1400 is he referring to hardwood?

[Tr. 140] MR. SIMON: Absolutely. The title of the article is: Are Hardwood Markets Changing? It is just about hardwoods.

THE WITNESS: I do see from 2000 and 2001, according to the Bureau of Census data, there was a reduction of hardwood lumber production.

BY MR. SIMON:

Q. When Mr. Luppold – that's for 2001, correct?

A. That's a reduction from 2000 to 2001.

Q. When Mr. Luppold writes: "The reduction and demand in price brought on by these changes caused lumber production to decline as sawmills shut or reduced hours."

Would you agree or disagree?

A. That's how production goes down is by someone producing less than what they produced year before.

Q. You are aware that Ross-Simmons Hardwood Lumber Company shut down, went out of business in May 2001?

A. I was aware it was sometime in 2001.

Q. Would you turn to the next page, please. Do you see the heading Global Market for Furniture and Other Wood Products?

A. Yes.

Q. Look at the third paragraph down underneath that. "Initially the hardwood lumber industry saw Asian furniture manufacturers as a market opportunity. We shipped lumber. [Tr. 141] They manufactured furniture along traditional U.S. styles and sold it to U.S. customers at low prices."

Agree or disagree?

A. Again, I'm trusting Mr. Luppold's analysis here.

Q. He knows hardwoods better than you do?

A. Sure. If you want to say that.

Q. "However, as Asian manufacturers established a critical mass of production capacity, they may have noticed that U.S. consumers showed little brand or species loyalty."

Agree or disagree?

A. Again, Mr. Luppold knows – he is the Forest Service guy in charge of watching the hardwood market.

Q. Okay.

A. If he writes it, I will take it at face value.

THE COURT: With that, let's put that in evidence. Then you can argue it and move on.

MR. SIMON: We move in 1378 and 1400 into evidence.

THE COURT: Any objections?

MR. HAGLUND: No, Your Honor.

THE COURT: They will be received.

(Exhibits 1378 and 1400 were received.)

MR. SIMON: Thank you.

THE WITNESS: I'm sorry. I should have said that sooner.

* * *

[Vol 3-B Tr. 10] point of those inventories?

A. I can't tell from my graph because I have so much jammed together here.

Q. You prepared this graph, correct?

A. Yeah, uh-huh.

Q. Your best estimate, sir.

A. I am just going to have to guess at this.

THE COURT: Isn't there another exhibit that shows it?

MR. SIMON: Not that I am aware of, Your Honor, I don't think that I've seen from him.

THE WITNESS: Well, it would be in one of those boxes, I'm sure. We could sort through that.

BY MR. SIMON:

Q. I'm not going to do it. You prepared this graph.

A. Yeah. I have a spread sheet, of course, which this is prepared from.

Q. Would you agree with me, sir, that the highest point is basically in the middle of winter, end of December?

MR. HAGLUND: Objection. For what years?

MR. SIMON: I just said the years. It would be 1989, 1993 and 1994.

THE WITNESS: In 1989, if I look at January, I can see that it's – okay. Let me assume that I have this lined up right, which is hard to do here, but let me make that [Tr. 11] assumption. And if that's true then that would be December,

November, October. It looks like the high point in 1989 is in October.

BY MR. SIMON:

Q. How about '94?

A. '94, January, December, November, October, September, and that's sort of what I –

Q. September?

A. That's what I remember, but I am not confident enough to say for sure it's September.

Q. All right. I'll present this to the jury. We'll argue it on this point.

Mr. Rasmussen, the highest point of your chart that goes here is for early 1994, end of 1993, correct?

A. That's right. Like I say, it looks maybe like it's September of '93.

Q. And for that high point in the end of 1993, early 1994, that's for the Longview mill, correct?

A. That's right.

Q. And approximately what's the volume of logs?

A. In '93, the high point looks like it's just a little less than 18 million board feet.

Q. Okay. And saw logs or pulp logs or both?

A. I believe this is total inventory.

Q. Now, there's a difference between saw logs and pulp [Tr. 12] logs, isn't there?

A. Yes. You will take saw logs and turn them into timber and pulp logs into pulp – pulp into chips.

Q. You take the saw logs and turn them into lumber?

A. Whatever you can out of it. A lot of that ends up becoming chips as well.

Q. But if you can extract it efficiently, you get a lot of good lumber from saw logs?

A. Depending on the efficiency, maybe 40, 50, 60 percent comes out as lumber. The rest comes out as chips.

Q. And obviously the amount of the efficiency depends – the amount that you get out depends upon the efficiencies of your mill?

A. And whatever you're trying to get out of it.

Q. If you're trying to extract the maximum quality of high value lumber, the amount that you get out depends upon the efficiencies of your mill?

A. I suppose that's right.

Q. Now, with pulp logs you make them into alder chips?

A. That's right.

Q. Alder chips are then sold to paper and pulp manufacturing?

A. Yes.

Q. Pulp logs still can stain if they're kept out too long in warm weather, correct?

[Tr. 13] A. Sure.

Q. Doesn't make the slight bit of difference to a pulp log?

A. I am not sure. I asked a couple of people in the industry about that and they hadn't – they hadn't thought about it, so I assume there's no discount.

Q. Thank you, sir. There was no one that you asked that ever told you that if a pulp log incurs a little bit of staining it makes the slightest bit the difference in the chip market?

A. That's right, I asked several people.

Q. And no one told you that it makes any difference?

A. Yeah.

Q. Now, with respect to the logs that are reflected in these charts here, some are stored in a log yard, others are stored in water, in rafts, in water, correct?

A. That's correct.

Q. By the way, did people that you talked to let you know that when you store saw logs in water it extends the life of that log for a great deal of time without causing stain problems?

A. That's what I've heard.

Q. Now, with respect to chips, I think that you have in your report – by the way, do you have your corrected expert witness report handy? It's the one that you signed and it's [Tr. 14] dated March 10, I believe.

A. Yeah. Yes, I do. I believe I do.

Q. If you don't, I have an extra copy here.

A. Okay.

Q. Would you turn to what you labeled as Figure 10, please.

A. Yes.

Q. Figure 10 is a chart that you prepared, correct?

A. That's right.

Q. And for Figure 10, you chart out Northwest Hardwoods' chip production for its various mills over roughly a 20-year period, correct?

A. Yes.

Q. What is the highest point of chip production that you see on this chart, year and mill, please?

A. Excuse me.

Q. Year and mill. The highest point of chip production.

A. It's 1993, and at Longview.

Q. Correct. Now, we're not talking inventory, we're talking actually produced chips. Do you know where the Longview mill, the Longview hardwood sawmill for Northwest Hardwoods, what it does with the chips that it produces?

A. I've heard that it goes to the Longview paper mill, but I don't know that for sure.

Q. Okay. But you do know that there exists a Weyerhaeuser [Tr. 15] paper and pulp mill in Longview?

A. Yes.

Q. Not too far from the hardwood sawmill owned by Northwest Hardwoods in Longview?

A. Not far at all.

Q. Okay. And you've heard that the Northwest Hardwoods sawmill makes not only hardwood lumber but also hardwood chips, and that those hardwood chips are sold to or sent over to the Weyerhaeuser paper and pulp mill in Longview.

You've heard that?

A. I have heard that, yes.

Q. And you've seen no reason – nothing in the documents that shows that's incorrect?

A. No.

Q. Okay. And we see here that the highest quantity of chip production was from 1993 in Longview, over a 20-year period?

A. That's right.

Q. Now, to make a large quantity of chips does one need a large quantity of pulp logs?

A. You need a large quantity of logs that you're going to chip. They don't necessarily have to be pulp logs.

Q. Fair enough. I can accept that. Now, if we go back to 1993, end of 1993, early 1994, on Exhibit 98, your spiked inventory, where the highest point there was for Longview in [Tr. 16] 1993, we've just gone over that, did you make any analysis or determination what portion of those logs were pulp and what portion – which would be used for chips, and which portion of those logs were saw logs which would be used for lumber? Did you make any determination at all?

A. No, I didn't.

Q. Wouldn't it be relevant to the analysis that you're providing to this courtroom and this jury?

A. What I don't have is the – I have – I have some information about the inventory and I have some information about production. What I don't know is what logs were used to make what product.

Q. You didn't have that information?

A. No.

Q. Did you ask Mr. Haglund for that information?

A. No, I didn't.

Q. Would it have been relevant to look into that before coming up with any conclusions?

MR. HAGLUND: Objection, Your Honor.

THE COURT: Objection will be sustained.

MR. SIMON: Thank you.

BY MR. SIMON:

Q. Mr. Rasmussen – Mr. Rasmussen, I am going to hand you for the sake of time several pages of documents that come from Plaintiff's Exhibit 418A.

[Tr. 17] THE COURT: Would you like to approach?

MR. SIMON: May I please?

THE COURT: You may.

MR. SIMON: Thank you, Your Honor.

BY MR. SIMON:

Q. Mr. Rasmussen, these are, for orientation purposes – here, let me tell you. These two pages that I've handed you are from Plaintiffs' Exhibit 418A. It is in one of those 16 boxes there.

A. That's right.

Q. Just for orientation so there's no confusion in my questions and your answers, just because they're in plaintiffs' exhibits doesn't mean that they are plaintiffs' documents. Do you see that down in the bottom right-hand corner, it begins with the letters "WY" and some numbers?

A. Yes.

Q. And you've done a lot of litigation before, correct?

A. I've done some.

Q. You've consulted in a number of trials?

A. A couple.

Q. You've participated in hearings?

A. Yes.

Q. You've consulted on litigation that even didn't go to trial?

A. Yes, correct.

[Tr. 18] Q. So you're aware of how the process works?

A. A little bit.

Q. You know that plaintiffs have the opportunity to get documents from the defendant and vice versa?

A. Yes. A lot of the information I used came from Weyerhaeuser's records.

Q. Exactly. So you understand that even though those boxes might be labeled Plaintiffs' Exhibits –

MR. HAGLUND: Objection, Your Honor. This is asked and answered.

THE COURT: Sustained.

BY MR. SIMON:

Q. Now, the two pages I've handed you, which, for the record, are numbered WY032954 to 955. It's a little hard to read in the first page, but I'll represent to you it says – do you see where it says, "Combined Longview consumption report," and it says, "January 1994"?

A. Yes.

Q. Okay. These two pages are for Longview, January 1994. Would you turn to the second page, please.

A. January is blanked out on mine.

Q. It's the hole punch. I'll represent to you and counsel, we have the document numbers, it said,

"January 1994."

A. All right.

[Tr. 19] Q. Now, do you see how this page is divided into sections? The top third talks about alder, the middle third talks about maple, the bottom third talks about something else?

A. Miscellaneous hardwoods.

Q. Okay. I'm only going to be asking you about the alder because that's what we're talking about in this trial.

A. Right.

Q. Now, do you see the top third relating to alder?

A. Uh-huh, yes.

Q. The first couple of lines talk about alder pulp, correct?

A. That's correct.

Q. Then there's alder saw logs?

A. Uh-huh.

Q. And then after that there's total alder?

A. Right.

Q. Now, with respect to the total amount of alder beginning in the inventory in January 1994, what's the approximate – and you can round out the number if you wish – what's the number of volume in the inventory column for total alder?

A. For total alder? You have it circled here?

Q. Yes.

A. Is that the number?

Q. Yes.

[Tr. 20] A. It looks like 12.8 – well, 12,856,820, it looks like.

Q. I think for our purposes 12.8 million would suffice.

A. Right.

Q. You'd agree with that?

A. Yeah.

Q. And since you told us earlier that you thought this high point of, oh, about – almost 18 million, 17-something million. I believe may have been in the September-October time period, we're now looking at the inventory report for January. Does this seem to correlate?

A. Yeah, it does, uh-huh.

Q. Now, for 12.8 million board feet of total alder, does this document break it down into how much was alder pulp and how much was alder saw logs?

A. Yeah. It tells me how much was in the inventory as pulp and saw logs. I don't know that it tells me how much was saw and how much was pulp.

Q. Fair enough. But listed in the inventory, does this show that 8.4 of the 12.8 million was alder pulp?

A. Right.

Q. Is that what it's shown as?

A. Yes, it does.

Q. And does it show that only about 4.4 million was for alder saw logs?

A. Yes, it does.

[Tr. 21] Q. Were you in the courtroom a few days ago when Bill Nelson testified that he thought an appropriate inventory would be between four and five million?

A. No, I wasn't.

Q. All right. May I ask, please, that you be given Exhibits 104, 105 and 106. You talked about these with Mr. Haglund. Sorry I didn't do this earlier.

A. Okay. I have them.

Q. Okay. Now, the exhibits that you received the information from, these were for the – excuse me one second.

These are the actual numbers based off of the ODF harvests for the years indicated, correct?

A. That's correct.

Q. All three of these charts are for the actual numbers?

A. That's right.

Q. Are you aware that the Oregon Department of Forestry predicts numbers going out into the future, amounts of harvest?

A. I am not sure what you mean.

Q. Okay. Are you aware that the Oregon Department of Forestry issues projections of how much it expects to be able to make available for harvest in the future? You're aware of that, aren't you?

A. Yeah. There's a forest plan. Is that what you're [Tr. 22] referring to?

Q. Yes.

A. Yeah, sure.

Q. And you're aware of it, just as often as not the numbers that the Forestry Department predicts as its harvest in the future are inaccurate as often as they're accurate. You'd agree with that, wouldn't you?

A. You mean they say, "We're going to do this," and then they do something different?

Q. Yes. They say that we expect that in the future, in five years from now or ten years from now, we expect that we'll have these amounts harvested from our lands, and they're wrong as often as they're right, correct?

MR. HAGLUND: Objection, vague, Your Honor.

THE COURT: The objection will be sustained.

BY MR. SIMON:

Q. Are you familiar with the fact – and I'm taking this one step at a time.

A. Okay.

Q. That the Oregon Department of Forestry puts out projections of how much it expects will be harvested in the future?

THE COURT: He said yes to that question.

BY MR. SIMON:

Q. All right. Now, do you personally, Mr. Rasmussen, have [Tr. 23] any experience determining in the past how often they're right and how often they're wrong?

MR. HAGLUND: Objection, no time frame, vague, ambiguous.

THE COURT: He can ask that question. The objection is overruled.

Have you had any experience with that?

THE WITNESS: Well, I've been working for the last two years for the counties that benefit from the harvest of the timber and with respect to the 10-year plan.

BY MR. SIMON:

Q. Can you answer my question, sir?

THE COURT: The answer is yes.

THE WITNESS: Yeah. I guess I am – I guess I know what the plans are. I know what's been done in the past. I know what the past plans said.

BY MR. SIMON:

Q. And based upon what you've seen of the past, have you seen that they've been inaccurate a fair number of times?

A. Are you talking about sales levels versus plans?

Q. Harvest.

A. Harvest?

Q. You don't know what harvest means?

A. Yeah. I'm trying to understand why anyone would compare harvest to this projection. Are you talking about [Tr. 24] cruise versus cut out perhaps?

Q. Mr. Rasmussen, I will simplify the question.

A. Please do.

Q. Based on your experience in the past, have you come to conclude that the State's predictions are not always accurate?

THE COURT: What predictions? Are you talking about the harvesting of certain types of logs or all types of logs?

MR. SIMON: All types or any types.

THE COURT: And any year?

MR. SIMON: Yes, based on his past experience.

THE COURT: Any year, all logs. Can you answer that question, Mr. Rasmussen? I'm not sure how it's related.

THE WITNESS: The State sells stumpage in three-year contracts, so at any time point – and they make a projection about how much timber is in those contracts that they sold. To help the counties plan their budget, they estimate when those sales will be sold and those sales are sold at – oh, I'm sorry, when the timber will be harvested and paid for, so the counties can sort of plan their budgets around that.

BY MR. SIMON:

Q. And with respect to those –

[Tr. 25] MR. HAGLUND: Your Honor, he's interrupting before the witness is finished.

THE COURT: Let him finish.

Go ahead.

THE WITNESS: With respect to those projections, I'll bet you anything they'd never hit it right on.

BY MR. SIMON:

Q. Okay. I'll accept that.

A. Okay. And I'd be surprised if anyone could ever make it right on.

Q. I'll accept that, too.

A. And I'd be surprised to find anyone who expected them to.

Q. And I'll accept that, too.

THE COURT: Mr. Simon, we're not too interested in what you accept.

MR. SIMON: Thank you, Your Honor.

THE COURT: Just ask the questions and not make speeches.

BY MR. SIMON:

Q. In 1999, are you aware that the Oregon Department of Forestry were making projections for such sales five and ten years in the future?

A. In '99, they were working on the planning process to cover the period from – well, a ten-year program. That was

* * *

[Tr. 34] Q. Did you investigate or perform any analysis of what else might have been going on to answer the question of why are the 1998, 1999, 2000 profits of Northwest Hardwoods lower than the average from either 1986 to 1995 or 1991 to 1995? Did you do that analysis?

A. Well, I could see that the reason the profits were lower was the log prices were higher while the lumber prices

– the log prices were going up while the lumber prices were coming down.

Q. Did you do any analysis that would tell you whether there were other things going on in the economy or the world that could contribute to lower profits in those later years?

A. Well, I was aware of things, sure, you know.

Q. And as we talked about earlier what you called the Asian economic flu happened in 1997 with what Ross-Simmons called, "The Asian Economic Crisis." You knew about that and you knew that that caused a number of hardwood sawmills to have lower sales to some extent or another. You knew that, didn't you?

A. What I saw was interestingly enough that the northwest – the hardwood sawmills in the Pacific Northwest saw a reduction in production, whereas the hardwood sawmills in the east, the total hardwood lumber production, went up between 1997 and '98.

Q. Okay.

[Tr. 35] A. That was another thing that made me think these are two different – two different markets, two different things.

Q. All right. Well, let's talk then about the Northwest sawmills, because you were only looking at the Northwest sawmills for the purposes of your damage analysis, correct?

A. That's correct.

Q. All right. So you knew that the Northwest Hardwoods mills that produced predominantly alder, you knew that? They made mostly alder, correct?

A. Correct.

Q. And you knew that their sales figures for the amount of alder sold for the 1998, 1999, 2000 period wasn't as great as it had been in years earlier. Is that what you saw?

A. No. I saw that there was a reduction from '97 to '98, but then there was an immediate increase from '98 to '99 and'99 to 2000.

Q. The increases then in those later years weren't as great or as steep as some of the increases in the earlier years, correct?

A. I think that the increase from '98 to '99 looks to me like the biggest increase in the time period.

Q. You knew that prices had been falling to some extent for alder lumber shortly after the onset of the Asian economic crisis, correct?

A. That's what the data showed, yes.

[Tr. 36] Q. Did you consider the possibility that there would be a reduction in the profit margins of the Northwest Hardwoods mills in the year after 1997, caused in any part at all by the Asian economic crisis?

A. The hypothesis that my calculation was based on is that if you control a large portion of the market for logs, you have some ability to control the price you pay for those logs.

Q. That wasn't my question, sir. Let me try to be clear about it.

A. Maybe say it again. I'll try to answer it.

Q. Sure. I'll try that.

Did you consider the possibility that the Asian economic crisis in 1997 in any way might have caused a lessening of the profit margins or annual pretax profits at the Pacific Northwest mills of Northwest Hardwoods? Did you consider that possibility?

A. My calculation assumes that – I guess you would look at that calculation as assuming that Northwest Hardwoods would be able to, by changing their log costs, deal with that crisis.

Q. And stated another way then, sir, your assumptions, your damage model assumes zero effect caused by the Asian economic crisis of 1997, correct?

A. No. It assumes that Weyerhaeuser could have controlled [Tr. 37] its log costs to maintain margins.

Q. Does your – are there any steps that you could have taken in order to try to determine what precisely was causing the lower profit margins in these later years as compared to the earlier years and your base years? Was there anything that you could have done?

THE COURT: I'm not – I'm not sure that that assumption is correct. From what I've heard there wasn't a lower margin in later years, I thought he just testified.

MR. SIMON: Your Honor, that's not the way I heard it, so I'd like to go back and clarify it. This is critically important.

BY MR. SIMON:

Q. I want to take a few steps back then and make sure I understand it. In Scenario B, you looked at the profit margins for the Northwest Hardwoods mills in the Pacific Northwest, excluding Longview, right?

A. That's correct.

Q. And for the period of 1986 to 1995, it averaged 17.5 percent?

A. That is correct.

Q. And for the years after that that was part of your Scenario B damage model, the actual pretax profits or margins that you observed were lower than 17.5 percent, right?

* * *

[Tr. 41] percent? Is there anything else you could have done –

A. Well –

Q. – besides the assumptions you made?

A. Yeah. There was one thing I did here that I don't know that we talked about. Mr. Haglund asked me earlier about the allocations for selling and general administration, and you remember I mentioned that in the year 2000 and the year 2001, those allocations were reduced.

And so in my scenarios, one thing I did was I put those back in at the previous year's level. So, in other words, the profit for – the reported profit for the year 2000, I lowered that to reflect the fact – or to make it more comparable to the previous years. So that's one thing I did. Does that answer your question?

Q. In part. Let's continue.

Did you investigate whether or not Northwest Hardwoods' labor costs had gone up or down in the period of 1996 through 2000, as compared to before 1995?

A. I think I made a graph somewhere and looked at the – what, on Mr. Novak's spreadsheet, called the variable manufacturing cost. And that would be – that would include labor and all the costs of running the mill.

Q. And so were labor costs higher or lower in the period of '96 through 2000 than they were in the period of, say – in the period of '91 to '95?

[Tr. 42] A. You might be more familiar with my report than me by now. Do you know if I put that graph in here?

Q. I didn't see it or at least I didn't see it in the results of your analysis.

A. As I recall, the variable manufacturing costs were relatively flat during that time period.

Q. Relatively?

A. Yeah.

Q. Did you investigate other costs to compare them to the relevant time period of '96 to 2000 versus your assumed base time period of either '91 to '95 for Scenario C or '86 to '95 for Scenario B?

A. I looked at – my source for this, you remember, is Mr. Novak's spreadsheets, and I looked at all of the costs. All of the values on his spreadsheet as I was doing my analysis.

Q. Is that where you got all your numbers from, Mr. Novak's spreadsheets?

A. They were all from Mr. Novak. I did all this a long time ago before we had any more data.

Q. So – and you didn't update your data or confirm it after receiving more data, correct?

A. No, that's correct.

Q. All right. And if Mr. Novak's spreadsheets then contain errors, then those errors would be reflected in your [Tr. 43] analyses?

A. I suppose so.

Q. Okay. Now, are you familiar with the concept – you're an economist, right? You told us that earlier.

A. Yeah.

Q. You are familiar then, are you not, with the concept of a regression analysis?

A. Yeah, but I don't think you have to be an economist to know about that.

Q. Well, okay. A regression analysis is used for, among other purposes, to try to isolate potential causes of changes when there's a number of possibilities. Am I correct in general terms?

A. Yeah, sure.

Q. Did you use – let me rephrase it the other way – you did not do a regression analysis as part of your preparation of Scenarios B and C. I'm correct, am I not?

A. I may have done some regressions, but they – I don't remember using them for B or C at all.

Q. And there was no regression analysis discussed in your witness report or in your exhibits, correct, with respect to Scenarios B and C?

A. Yeah, with respect to those, that's true.

Q. Okay. And you could have done that, am I correct?

A. I could have done what?

[Tr. 44] Q. A regression analysis with respect to Scenarios B and C.

A. Well, I'm not sure how I would have used regression for Scenarios B and C.

MR. SIMON: Okay. Then another witness will have to explain it to us. I have nothing further.

THE COURT: Further questions, Mr. Haglund?

MR. HAGLUND: Yes, thank you, Your Honor.

THE COURT: And, Mr. Simon, no more comments to indicate argument. Let's not do that. You may examine.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Rasmussen, you were asked a variety of questions about stumpage versus log prices. In your experience could you explain the difference or are there differences in how stumpage prices may move over time compared to open market log costs?

A. Yeah. When you buy stumpage, the transaction occurring is, if I were going to buy a stumpage sale, the land-

owner would go out and mark the boundary, make some estimates about what kind of volume is out there, and then typically open it for bid.

I would bid on that stumpage at often certain dollars per thousand, either by species sometimes, rarely,

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[Vol. 3-B (Apr. 10, 2003)] [Testimony of George Lukin]

* * *

[Tr. 50] Q. And are you here pursuant to a subpoena that was served on you last week?

A. Yes.

Q. Have I ever met you before you showed up to the courthouse today?

A. No.

Q. So I don't know your whole background, I'm going to have to ask the questions. Before taking on this new position in the woodstove industry, did you work in the forest products industry for about 20 years?

A. Yes.

Q. And was that – was a part of that '96 through early 2001, with the WTD Industries' alder sawmill in South Bend, Washington?

A. Yes.

Q. And that mill closed in early '01?

A. Like January, I think.

Q. What was your position?

A. Timber manager.

Q. So what was your responsibilities?

A. Buying logs and run a log yard.

Q. What type of logs?

A. Alder saw logs.

Q. That was an alder sawmill?

A. Yes.

[Tr. 51] Q. In terms of your competition with Northwest Hardwoods' mills for alder saw logs during that five-year time frame, what mills, Weyerhaeuser mills in Washington, would you have been competing with?

A. The one in Centralia and the two up north there.

Q. Arlington and Sedro Woolley?

A. Yes.

Q. Now, South Bend, is that the Grays Harbor area?

A. Pacific County.

Q. Pacific County. During the '96 to '01 time frame, were there substantial Douglas fir log exports out of that area?

A. Yes.

Q. Who's the biggest landowner in that area?

A. Weyerhaeuser.

Q. In your work as a log buyer for WTD's alder mill, did you come into regular contact with Weyerhaeuser's export log buyers?

A. Yes.

Q. Do some of them live in that Grays Harbor area?

A. In Aberdeen.

Q. Now, calling your attention to the '97-'98 time frame, did you – were you told anything by a Weyerhaeuser log export buyer about the need to provide extra assistance to Northwest Hardwoods?

A. Could you say that again?

[Tr. 52] Q. Did you have a conversation with somebody from Weyerhaeuser in the log export area in 1997-'98, about them providing help to Northwest Hardwoods?

A. Yes.

Q. Could you describe the conversation.

A. They – they just said that Northwest Hardwoods was trying to tie the alder saw logs in with the export sales.

Q. What does that mean or what did you understand that to mean?

A. If you wanted to sell your fir and hemlock to Weyerhaeuser, then you needed to sell your alder to Northwest.

Q. So if – and who was this person you were talking with?

A. Bruce Sutten.

Q. And what's his capacity at Weyerhaeuser?

A. Export logs, I think, in the Aberdeen sorting yard.

Q. Is he the manager of that?

A. I think so.

Q. And you need to explain this for the judge and the jury, when he told you that they were being told to tie the export logs with the alder logs for Northwest, what does that mean? What were they going to be telling loggers to implement that policy?

A. That in order to sell their fir, hemlock, whatever, to the export log yard there that they would have to sell the [Tr. 53] alder saw logs off the same sales to Northwest Hardwoods.

Q. Now, in a private patch of timber that a logger has a contract to log, are the highest value logs coming off of that going to be the export grade Douglas fir and hemlock?

A. At that time they were, yes.

Q. And so if that logger wanted to be able to sell his export grade logs to Weyerhaeuser, those export log buyers

were saying you've also got to send the alder off of that patch of timber to Northwest Hardwoods?

A. Yes.

Q. Okay. Did you actually see evidence of that policy in the field in 19 – during your years after that conversation at WTD Industries?

A. Just from loggers, had stated that.

MR. SIMON: Objection, Your Honor, that's hearsay.

THE COURT: If you – if you had experience sufficient to be satisfied that was the fact, you can testify to it.

MR. SIMON: Your Honor, may I ask a brief question in aid of objection on that point?

THE COURT: You may.

QUESTION IN AID OF OBJECTION

BY MR. SIMON:

Q. Is the entirety of your experience based upon what log buyers told you?

[Tr. 54] A. I don't understand the question.

Q. Sure. If the entirety of what you're about to answer to Mr. Haglund – by the way, my name's Michael Simon, one of the lawyers for Northwest Hardwoods – is the entirety of your information about this area, what other people, log suppliers told you on that issue?

A. Yes.

MR. SIMON: Thank you, sir.

We would object, Your Honor.

THE COURT: The objection will be overruled. The evidence is in the witness statement. Under Rule 701, this is, in effect, an opinion, and if it is rationally based on the perception of the witness, I will allow it.

So how much experience did you have, and do you feel that's an accurate statement?

THE WITNESS: Yes.

THE COURT: It will stand. The answer will stand.

BY MR. HAGLUND:

Q. During the 20 years that you were in the industry, were you primarily involved in buying and selling logs in that Grays Harbor area?

A. I think about eight years doing that.

Q. Okay. And you were the resource manager for WTD with the principal responsibility for five years at their alder mill?

[Tr. 55] A. Yes.

Q. Now, at the time that you heard this con' – that you had this conversation with Mr. Sutten, who was the dominant export log purchaser in that part of Washington State?

A. Weyerhaeuser.

Q. The whole five years you were in your job at WTD?

A. Yes.

Q. Now, lastly, Mr. Lukin, I want you to assume that there will be some testimony from Northwest Hardwoods/Weyerhaeuser log buyers from Centralia, Sedro Woolley and Arlington that they have never increased their original bid to a logger or landowner in the face of a competing bid from a competitor.

Having made the assumption that they will testify in that fashion, do you consider that to be consistent with your experience in the industry buying and selling alder saw logs?

MR. SIMON: Excuse me. Objection, Your Honor, may I be heard briefly?

THE COURT: The objection will be sustained.

MR. SIMON: Thank you.

THE COURT: The question may be rephrased as to what his observations were without respect to commenting on the testimony of other witnesses.

BY MR. HAGLUND:

Q. I'll rephrase. Mr. Lukin, in your experience competing [Tr. 56] with the log buyers from the Northwest Hardwoods' mills in Centralia, Sedro Woolley and Arlington –

THE COURT REPORTER: I'm sorry, could you repeat that.

MR. HAGLUND: Okay. I was going too fast. I'll have to start over. My apologies.

BY MR. HAGLUND:

Q. Mr. Lukin, in your experience, competing with the log buyers from the Northwest Hardwoods' mills at Centralia, Sedro Woolley and Arlington, did you observe those log buyers increase their original bid to a supplier in the face of a competing bid from a competitor like yourself?

A. Yes.

Q. And that was a regular practice you observed in the marketplace?

A. Not every time.

Q. But it happened more than once?

A. Yes.

MR. HAGLUND: Thank you very much. No further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Lukin, Michael Simon, the attorney for Northwest Hardwoods.

* * *

[Tr. 58] from a Northwest Hardwoods log buyer, correct?

A. Not that I can remember.

Q. You learned that from the log sellers?

A. Right.

Q. And the log sellers wanted to increase the prices that they were getting for their logs, correct?

A. Yes.

Q. And as you sit here today, you can't tell us whether those logs sellers were being straight with you, can you?

A. Some of the guys that I deal with I trust that they would not lie to me.

Q. And others you don't?

A. Right.

Q. And when you were buying for WTD, sometimes you'd get the logs, right?

A. Yes.

Q. And sometimes Northwest Hardwoods would get the logs, right?

A. Yes.

Q. And sometimes Cascade would get the logs?

A. Yes.

Q. And sometimes Ross-Simmons would get the logs?

A. Yes.

Q. And sometimes Washington Alder would get the logs?

A. Yes.

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[Vol. 3-B (Apr. 10, 2003)] [Testimony of James Webber]

* * *

[Tr. 62] BY MR. HAGLUND:

Q. I'll start over, Mr. Webber. In your experience competing with the log buyers from the Northwest Hardwoods mills in the places you mentioned and based on your personal experience, did you see those log buyers increase their original bids to suppliers in the face of a competing bid from you?

A. I didn't see the paperwork, but I increased my bids and the logs did not come to me and they did go to the Northwest Hardwoods mills.

Q. Did you learn from loggers that they had increased their bid?

A. That they did get a bump in price.

MR. HAGLUND: Okay. No further questions. Thank you.

THE COURT: Any cross?

MR. SIMON: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Mr. Webber, in the year 2001, did you take any steps towards beginning to form Willapa Bay Hardwood Company?

A. Yes.

Q. Tell us what you did in 2001.

A. Let's see, 2001. In September, I believe it was around August or September of 2001, old WTD mill, Pacific Hardwoods [Tr. 63] in South Bend, they began to – they were going to go to auction. There had been some interest

from some of the employees at the time to buy – purchase the mill.

And at that time, we began working on a business plan and – to purchase Pacific Hardwoods' mill and assets of Pacific Hardwoods to run that mill.

Q. And are you one of the owners of that mill?

A. I am a shareholder.

Q. Okay. Now, I take it then you got the financing for that mill?

A. Yes.

Q. It's operating?

A. Yes.

Q. It cuts alder lumber?

A. Yes.

Q. And you consider yourself one of the competitors of Northwest Hardwoods' mill, correct?

A. We use a different – we using pulp grade logs and they use saw logs, so in an indirect way. I mean, we both cut alder lumber.

Q. And you both sell alder lumber?

A. We both sell alder lumber.

MR. SIMON: Thank you, sir.

I have nothing further. Thank you.

THE COURT: Any further questions?

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[Vol. 3-B (Apr. 10, 2003)] [Testimony of Eugene Novak]

* * *

[Tr. 68] Weyerhaeuser.

Essentially, I had all the financial reporting and had the data processing, I guess in today's terminology known as IT. You know, the traditional payables, receivables, you know, financial statements, planning process, that all fell under my responsibility. I managed the people in the business in that area.

Q. And where were you working out of?

A. Here in Portland.

Q. And who did you report to?

A. I reported to Arnold Curtis, who was the president/vice president of the business.

Q. And how many personnel worked for you or were supervised by you here in Portland?

A. I think initially it was about six or seven, and it grew to 12 or 14 in the Portland office.

Q. Were you a part of the so-called senior management team as comptroller?

A. Yeah. Yes, I was.

Q. Were there regular monthly meetings of that group?

A. There were regular meetings if Arnold was in town. He wasn't always in town. If he was not in town, we did not have a meeting.

Q. Now, do you remember discussions with Arnold Curtis and Heinz Hohendorf about the use of the log market against the [Tr. 69] competition?

A. The log market was discussed on a continual basis month after month in these meetings, as well as outside of the meetings.

Q. And what do you remember being said about using the log market?

A. Be very aggressive, you know, procure wood. You know, just source our mills and keep them running full two shifts.

Q. Was there a discussion about using the log market to hurt competitors?

A. I don't think I heard the words "hurt competitors," but it certainly was implied to be aggressive in the log market, yes.

Q. How would you describe the interest that the division showed toward tracking or monitoring its competition?

A. Well, the competition to me, as I viewed it, was – always seemed to be a constant, you know, concern for the business, and so they were aware of what the competitors were doing. As best you could without obviously being in their office and seeing their books.

I mean, the log buyers reported back constantly about the status of log yards and competitors, and were a pretty knowledgeable information base that was exchanged. I don't know if there was anything formally documented as such.

[Tr. 70] Q. But you were aware of regular monitoring of log yards and competitor information?

A. That was done, yes.

Q. How would you – how did you consider the emphasis on competitors within the senior management group? Was it low, medium, high? How would you describe it?

A. For me personally, it was excessive. I could not understand being as large as Northwest Hardwoods was, even

in the beginning, back in '81, we were the largest mills and as it progressed over the years, I never could understand why we were so concerned about the competition, being that we were the dominant player.

Q. Now, in the Portland office, who was in charge of sales?

A. Cliff Chulos was the vice president of sales at the time.

Q. What's your opinion of Mr. Chulos in terms of the hardwood industry?

A. I think Mr. Chulos is the most knowledgeable man I've ever come in contact with relative to the hardwood industry. I don't think anybody knows more about hardwoods than he does.

Q. You had any – you worked at a company founded by Mr. Chulos for a few years; is that right?

A. That's correct. North American Wood Products.

[Tr. 71] Q. And you left in '95?

A. That's correct.

Q. Have you had any contact with Mr. Chulos since then?

A. I haven't seen Cliff since '95 when I left.

Q. Now, you returned to Weyerhaeuser in '95, and were there through the end of 2001?

A. That's correct.

Q. Now, during that time frame, did you – were you – did you have interaction with senior management?

A. All the time. I was one of the senior managers, you know, for, you know, the time prior to that. I also worked with the senior managers for a while in '98 when I accepted the controller's position. Again, I was back on what they

called the lead team at that time. Yes, I was very much – I rubbed elbows with them and, you know, discussed issues, you know, strategies and so forth on a regular basis.

Q. Mr. Novak, was there within that core group of senior management, was there any recognized understanding of the company's relative position in the alder saw log and finish alder lumber markets?

A. If I understand your question, I think you're talking relative size to competition?

Q. Yes.

A. Yeah, we were very much aware of that. We estimated, you know, what the size of that was.

[Tr. 72] Q. What do you recall management understood its market share or size to be in the saw log market?

A. Probably 60, 65 percent of it.

Q. How about in connection with the alder lumber market?

A. At least 60, 65, maybe 70 percent.

Q. Now, did management understand that it had the power to control the log market?

MR. SIMON: Objection, leading.

THE COURT: Objection overruled.

THE WITNESS: I think it's fairly obvious if you're that size you have a fairly persuasive impact on the market situation.

BY MR. HAGLUND:

Q. My question was: Did the senior management of Weyerhaeuser, as you observed them, understand that?

A. Senior management of Northwest Hardwoods or senior management of Weyerhaeuser Company?

Q. Senior management of Northwest Hardwoods.

A. Northwest Hardwoods senior management, people were very much aware of it, yes.

Q. Were they likewise aware of their power to control alder lumber prices?

A. I would say so, yes.

Q. Do you remember – going back to your first 10 years or 11 years with Northwest Hardwoods, do you remember [Tr. 73] discussions about the antitrust laws or monopolies?

A. Well, first of all, we were constantly made aware of the antitrust within Weyerhaeuser because of the issues that arose –

MR. SIMON: Objection, Your Honor.

THE COURT: The objection will be sustained to the last part. The first part will stand. You were constantly aware of the antitrust situation, but without going into detail.

THE WITNESS: We were aware of it.

BY MR. HAGLUND:

Q. Now, were there discussions with Arnold Curtis about the position of Northwest Hardwoods in the industry in the antitrust or monopolization contest?

A. There were discussions about antitrust issues.

Q. With Arnold Curtis?

A. With Arnold Curtis and the senior team on numerous occasions.

MR. SIMON: Objection, Your Honor. Beyond the scope of the witness' statement.

MR. HAGLUND: Your Honor, this is a witness we had to subpoena. It covers at the end, bottom of Page 32.

THE WITNESS: The objection will be overruled.

BY MR. HAGLUND:

Q. What do you remember about those discussions?

[Tr. 74] A. Well, it was a concern about our position relative to the total volume we had both in the lumber market as well as the log market, and that goes back, as I recall, as early as 1984.

And I was certainly made aware of the fact that within alder we had a well known, I guess you would say, monopolistic basis. That was the concern that was always raised by the people within the business as well as probably people outside the business.

Somewhere, as I recall, in the '80s we were instructed to basically look upon alder as not being unique and different and to think of it as just another species of the industry, which in that case, instead of having a monopolistic position, you would have about two-and-a-half to four percent of the market of the total hardwood industry in this country.

Q. Now, in – I'd like to call your attention to the time frame of 1998. You were offered the controller position in February; is that right?

A. That's correct. I accepted it in February.

Q. And you left it some nine months later in '98?

A. That's correct.

Q. And could you explain why that was.

A. Well, it is really two, two or three reasons. One, I had a quadruple bypass surgery in July of 1997. My health [Tr. 75] was an issue. Secondly, I was going through a rather difficult divorce which lasted almost two years before it become final. And, thirdly, it required me to relocate to Federal Way, and I did not want to relocate to Federal Way.

Q. Who replaced you as comptroller of the division?

A. Vicki McInnally was hired. Well, first of all, I was offered by Rob Taylor, the director of finance and planning for the whole business after Karen Moll left, and then when Karen Moll left, Vicki McInnally was hired as the director of finance and planning for the whole business, and I subsequently wound up reporting to her.

Q. You reported to her and what title did you have then?

A. Senior business analyst.

Q. What did you think of Ms. McInnally as a comptroller?

A. Very capable, very knowledgeable, very good person.

Q. What kind of relationship did you consider yourself to have with her?

A. I thought we had a great relationship.

Q. Now, what does a senior business analyst do at Weyerhaeuser in a business like Northwest Hardwoods?

A. It can range from a myriad of projects. You can be involved in working on a major capital project, gathering the information and putting together the financial analysis of support.

It could range to developing a financial model. [Tr. 76] It could be a special project, special evaluation of some particular business issue, or it could be part of the strategic development. Also, in my case, I worked on acquisitions.

Q. Did you do any – at some point, did you participate in an analysis of the financial performance of the Diamond Wood acquisition?

A. I wasn't involved with the acquisition of Diamond Wood Products. That had taken place while I was there, but I was not involved with it. I was involved with the implementation of the acquisition as far as converting the business over to our books and developing reports and formats and proc-

esses that would fit into the Northwest Hardwoods/Weyerhaeuser style of management.

Q. Now, as part of senior management, you are familiar with the sales and marketing strategy of the division?

A. I was familiar with it. I wasn't involved with all of their, you know, detailed meetings, but as part of the association with the lead team, I would be involved in key meetings. And if there was a special study going on, I would be involved with it.

Q. Was it well recognized by senior managers that the proprietary grading system helped set the alder industry apart from other hardwoods in the United States?

A. Oh, absolutely. I don't think anybody else prior to [Tr. 77] them had it, and I don't know who's had it since.

Q. Did – as you observed the policy within the division, did you observe as part of a sales strategy sales managers selling to customers the idea that Weyerhaeuser could exert greater control over alder prices in comparison to what would happen with eastern hardwood lumber?

A. Well, I think it stands to reason if you understand the industry that would be a logical, you know, conclusion. You could because there were only a handful of mills. I think – I don't know what the exact number was. It was at one time 60-some alder hardwood mills. It's dwindled down to about 15 now, so in comparison to the rest of the industry which has several thousand hardwood mills.

Q. Did you observe that actual evidence in the marketplace in terms of alder lumber prices falling more slowly when the rest of the hardwood market was in a deep decline?

A. Yes, I would say that would be the case.

Q. And on the other side of the coin, did you see Northwest Hardwoods successfully restrain the upward rise of al-

der lumber prices when the rest of the hardwood market was rising sharply?

A. That was the strategy, yes.

Q. And that was a strategy that was sold as an advantage of customers buying alder in terms of the stability of supply?

[Tr. 78] A. Yes. I think the philosophy was: You be with us in the hard times for our side, we'll be there in the hard times or the times when the product was hard to get.

Q. Now, moving to the last part of the 1990s, '98, '99 and 2000, Mr. Novak, in your capacity as a senior business analyst after November of '98, did you engage in some financial modeling to try to understand why Northwest Hardwoods' margins were declining so significantly in that time frame?

A. I built a rather elaborate financial model for the alder business to be used by management to try to get our hands around the issues that, you know, were ongoing.

Q. And why is it that you built this model?

A. I felt, from my perspective, that's how I could help, you know, the team understand the whys and wherefores of the profitability of the business or lack of profitability at times. I also felt that it was a vehicle that would get everybody on the same page relative to what the business was doing, ranging from the procurement of raw materials all the way through the sales of product.

Q. Was this model that you built developed in part because your analysis showed a disconnect between what lumber was doing and the performance of log costs?

A. I thought there was a disconnect, yes.

MR. HAGLUND: I'd like to ask that witness be [Tr. 79] given the witness notebook if it isn't up on the – jury notebook, I'm sorry.

BY MR. HAGLUND:

Q. Now, Mr. Novak, if you would turn in that notebook to Exhibit 44 – Plaintiff's Exhibit 414. I'd like to display the first page. And what is Exhibit 414?

A. Well, this is the – one of several pages that I put together, one for each of the alder locations. And what I and the team of people would consider to be the key numbers of the business without getting buried in the total detail, and it ranges from, in this case, this mill in Arlington in 1981 to the year 2000, 1981 was the first year – first full year under Weyerhaeuser's ownership of Northwest Hardwoods.

Q. So on this page, Page 1 of this exhibit, is the Arlington mill; is that right?

A. That's correct. At least that's what it looks like. Yes, it is.

Q. And you displayed key financial statistics for 20 years running?

A. That's correct.

Q. And could you explain, and I'll zoom in here, in these first couple of boxes on the left-hand side, why you were selecting these particular statistics?

A. Well, these are all the major cost components of the business.

[Tr. 80] Q. Both revenue and cost?

A. That's correct.

Q. As well as overhead?

A. And overhead is on there as well, yes.

Q. And then you've got production and other statistics arranged as you move down the page?

A. That's correct.

Q. And what were you – down below you have some information where you've got things displayed as a percent of sales. What were you trying to do in this part of your model?

A. What I'm trying to do is just show the relative relationship of various components of cost to the sales over a period of time.

Q. And if one analyzed the data for Arlington that's shown on this 20 years, was there a – anything that kind of jumped out at you as the principal reason for the decline in profit margin at the Arlington mill in the last – say, in that '98 to 2000 time frame?

A. Well, you can see that the percentage of raw materials cost to sales declined rather dramatically.

Q. So let's see if I can do this. I will highlight that line. And what are we seeing there as you move from the mid-'90s through the balance, especially the last couple of years, in terms of raw material costs?

[Tr. 81] A. The trend line shows that it was in the low 40s and it kept climbing up into the low 50s, as far as the relationship of raw materials to sales.

Q. And you are not seeing either dramatic declines or increases in the other major cost categories that you've displayed down below?

A. That's correct.

Q. Okay. Let's turn to the third page of this, which happens to be Longview, and I've already got highlighted a couple of lines. One of them is pretax profit. What are we seeing is happening to the pretax profit for the Longview operation of Northwest Hardwoods between '97 and the end of 2000?

A. Well, it's declined rather significantly.

Q. And I want to call your attention, sir, to the other highlighted area where – right here, of the allocations. What are those categories?

A. Well, those were allocations from the overhead cost that were associated with the business, and it principally would be – would have been at the time I was there, would have been a Portland office and the Federal Way office, and it was a combination of the general administrative and the selling cost.

Q. And, Mr. Novak, what happened in 2000 to the selling and G&A allocations to the Longview mill?

[Tr. 82] A. I believe that was a time frame that the management made the decision not to allocate all the costs out to the operations.

Q. So was there a dramatic reduction in these historic allocations that had gone on for many years in the year 2000?

A. There was a dramatic difference in how they were distributed out. There wasn't a dramatic difference in the cost of them.

Q. But the financial – year-end financial statements that would display the financial performance of the alder sawmills saw a big change between selling G&A allocations in 1999 and 2000; is that right?

A. That's correct.

Q. What's your understanding of why that was done?

A. My understanding of it, since I think I am fairly knowledgeable about the business and the financial statements, it was done to make the mills look better.

Q. Now, Mr. Novak, once you had completed the financial model that's reflected in these six pages, one page of key stats for each mill, did you distribute it to anyone?

A. I distributed it with a very brief e-mail to Rob Taylor.

Q. Did it go to – and I'm referring to Exhibit 414, you had it in a electronic format, I take it, then?

[Tr. 83] A. It was in electronic format, Excel worksheet.

Q. And you sent it to Mr. Taylor?

A. I sent it to Mr. Taylor, yes.

Q. Anyone else?

A. I copied Jerry Martin and Don Barton.

Q. And I'd like to put on the screen what's been marked as Exhibit 412. And what is Exhibit 412, Mr. Novak?

A. 412 is a copy of the original brief e-mail message to Jerry Martin, you know, which had the attachment to it, and also shows his response to me in regards to that.

Q. So your e-mail to Mr. Martin says, "This document was sent to Rob this morning after I was asked my thoughts, impressions. Like the memo you shared with me last week, I would appreciate your confidentiality in this matter."

And he would write back – that's the upper part?

A. That's Jerry Martin's comments, yes.

Q. So you got back a response the very same day?

A. That's correct.

Q. "Thanks for the candid views. As always you have had the best interest of the company at heart."

That's Mr. Martin's response to you?

A. Those are his responses to me.

Q. Okay. Now, turning to Exhibit 413, is this a copy of the e-mail that you sent – same e-mail that you sent to Mr. Martin down below to Don Barton?

[Tr. 84] A. That's correct, it is.

Q. And his response is up above?

A. That's correct.

Q. Now, he says there, "Important message here. Maybe you ought to accidentally broadcast it to a little wider audience." Why did you send it to so few people?

A. Well, there was a lot of frustration about the profitability of the alder operations at this time. Both Jerry Martin and Don Barton and I had conversations about that profitability and the issues associated with it, and it was strongly felt that the major issue was the raw material cost.

Both had had discussions with Mr. Taylor. Both were frustrated with the fact that they didn't feel like things were, you know, occurring to change the situation. They were people I worked with on a regular basis, and I sat down and said, "Well, maybe if I put together an analysis and send it to them, maybe if he saw the numbers in black and white, they might sink in a little easier if you could visualize it as opposed to the just talking about it."

Q. Did you – you sent this e-mail also to Mr. Taylor?

A. No. The original e-mail went to Rob.

Q. Right. And did Mr. Taylor respond?

A. Well, originally all I sent was the Excel workbook with the six, you know, analyses on it and a very brief e-mail [Tr. 85] cover letter. His response was that he didn't see anything dramatic in there, I think, something to that effect. And that he referred to me as the so-called ace analyst, and he would appreciate it if I had any comments to share it with him. And I proceeded to do that with a follow-up e-mail.

Q. And I'm now going to put on the screen a document that is in the juror notebooks. That is Exhibit 411.

Now, is this – so you got this brief response from Mr. Taylor, and then what did you do? Did you draft this?

A. I proceeded to draft this letter to him and a Word document and attach it to an e-mail.

Q. And why? Why did you draft up a memo?

A. He asked me my thoughts.

Q. Are those your thoughts?

A. Those are the thoughts at the time, yeah.

Q. Just calling your attention to the first paragraph here. You were using his term when you referenced yourself as an ace analyst?

A. That's his term. I don't think of myself that way.

Q. In the third paragraph, why did you feel the need to say, You know that I have never been one to mince words, not share an opinion, challenge issues, et cetera"?

A. I think there was an understanding within our organization that I was willing to tackle and get involved [Tr. 86] in the tough issues and express my views on it and that's basically what I said.

Q. Okay. Let me turn to Page 2 of this memo. And at the top in the first paragraph you say, "If we have what we believe to be 65 to 70 percent of the alder activity in the form of logs and lumber, then why have we seen Northwest Hardwoods see this prolific increase in the price of logs? When you look at the fact that Northwest Hardwoods expanded in size through acquisition and internal growth, you would think that the opposite would have occurred for obvious."

Should there have been another word at the end of that second sentence? Should it have been for obvious reasons, or what did you mean by this paragraph?

A. Well, I think it says what it says. It says we had the predominant market share, and in so doing, you know, it doesn't make a lot of sense to see why the price of the logs

were going the direction they were going when we had such a large market share.

Q. Is this commentary the basis of the disconnect you referred to in this memo?

A. I'd say it is at the very heart of it.

Q. Okay. Now, I'd like to turn now to another paragraph just down the page. It reads, "If I understand some of the thoughts that came out of the meetings over the past few weeks, it is my understanding that Northwest Hardwoods' [Tr. 87] annual potential opportunity for raw material costs improvements range up to $20 million. Does that infer that we have given up some 40 to $60 million in the last three years?"

Why did you write this paragraph?

A. I wrote this paragraph in response to a comment by Rob Taylor that said he thought the impact of high raw material costs cost Northwest Hardwoods over $20 million on an annual basis. I was in a series of meetings that were involved in remodeling early in 2001.

Q. So this memo's written in March, late March 2001. And you had been a part of meetings earlier in the year where there were discussions about how Northwest Hardwoods could reduce its log costs?

A. Yes.

Q. And do you understand Mr. Taylor saying something about them being higher than they should have been?

A. Yes, he did.

Q. What did he say?

A. Well, basically he said they were, you know – I think the comment, you have to go back. My memory – it's been a long time now.

The comment was that we had given up about $20 million in potential log cost opportunity within the last year.

[Tr. 88] Q. So was it your understanding that he felt Weyerhaeuser had overpaid by $20 million for its logs?

A. That would be my assumption, yes.

Q. Okay. Now, when you sent this memo to Mr. Taylor, did you get any subsequent reaction from him?

A. No.

Q. No response in the next week or two?

A. Well, the only response that I got was a short comment verbally to me, which was basically, "I understand where you're coming from."

Q. That was all?

A. That's all he said.

Q. Now, during this 2000-2001 time frame, did you have some meetings with Vicki McInnally regarding the financial model that's Exhibit 411? Those are the spreadsheets.

A. These spreadsheets here?

Q. Yes.

A. No. I don't know that Vicki saw these, unless Rob gave these, because I did not give a copy of these particular sheets to her.

Q. Okay. Well –

A. The financial model that I – you would be referring to would be the financial model that was the large multiple worksheet, western alder operation model.

Q. Let me rephrase my question. Did you have discussions [Tr. 89] with Ms. McInnally in early 2001 about the disconnect between logs and lumber markets?

A. Well, there was lots of discussion because she was my boss and she was very much aware of the profitability issues of the western operations, so there was a continuum of discussion on an ongoing basis about the issues of raw materials, and one of the concerns was trying to get this model where I had built be implemented, so there was a regular discussion of the issues all the time.

Q. Did she ever say anything to you why logs had gone up when the lumber market was going down?

A. Yes.

Q. Could you please state what she said.

A. I was up there for some other project at the time, you know, but she – I was frustrated. Myself, I was frustrated with the log cost situation. I said I didn't understand the whole reason why the log costs was so high. And the next thing I heard was, "Well, that was the strategy that we designed" I threw my hands up in the air, and I said, "Well, wait a minute here. I don't want to hear this. That's not part of the conversation I want to be a part of."

Q. Why?

A. Well, that's an antitrust issue.

Q. Did this happen only once?

A. Well, surprisingly, it happened a couple of days later, [Tr. 90] which I was totally caught off guard again the second time about, and I just said, "I do not want to talk about these issues." In that tone, because the way she said it to me implied something other than – than what I was willing to get into.

Q. Now, Mr. Novak, were you – did you subsequently lose your position with Weyerhaeuser at the end of the year?

A. I was informed that I was out of a job on September 12, 2001. I had a job until the end of the year, and my re-

sponsibilities from that point forward was to try to find a job in Weyerhaeuser or outside.

Q. Now, why do you believe you were let go?

A. I personally believe I was let go because I wrote this letter and some of the other issues surrounding this raw material cost issue.

Q. Now, before you – how long – at the point where you departed Weyerhaeuser on December 31, 2001, how many years had you been with the company all totaled?

A. Just short of 30.

Q. After you learned that you – your position, that you were losing your position and were being terminated, did you write a letter to the chairman and CEO of the company, Steven Rogel?

A. Yes, I did.

Q. Why?

* * *

[Tr. 100] right?

A. Sure.

Q. Okay. Do you remember any of those issues, what they were?

A. Yeah. We talked about the financial modeling. We talked about projects back in the Midwest relative to other financial modeling. We talked about PACE, which is the Process to Achieve Capital Effectiveness.

THE COURT REPORTER: I'm sorry, would you say that again?

THE WITNESS: PACE, P-A-C-E.

BY MR. SIMON:

Q. And then after that discussion, you said something about log prices; is that right?

A. I made a comment that I didn't understand how we could continue going down the path we were going as a business with the log prices being where they are, and why, as the management team, things weren't getting, you know, accomplished to do something to lower them.

Q. And that's when she gave the response that you told us about; is that right?

A. That's correct.

Q. Can you tell me, exactly what were her words, as best as you can recall?

A. I can't tell you the exact words because it's been over [Tr. 101] a year.

Q. As best as you can do, sir.

A. My recollection of what she said was that that was the business strategy, to price the logs up to deal with the competition.

Q. And then if I heard you correctly in response to Mr. Haglund, "I threw up my hands and said I don't want to have anything to do with this."

A. That's correct.

Q. And I take it when you say that you literally mean you threw up your hands?

A. I literally threw my hands up in the air (indicating) and said, "I don't want to hear this."

Q. Okay. Now, you just now put your hands up basically where your elbows are perpendicular. Is that about how you did it or did you go higher or perpendicular like you just showed us?

A. I don't recall.

Q. But you threw your hands up, essentially saying, whoa, right? Is that what you were trying to communicate to her?

A. I was communicating to her I didn't want to listen to the subject matter.

Q. Okay. So you threw your hands up, and as best as you can recall, what did you say to her?

A. I said I don't want to go there with this conversation.

* * *

[Tr. 108] Q. Okay. And you didn't go there. We established that.

A. I didn't want the hassle.

Q. Okay.

A. I didn't want to hear the comments to begin with.

Q. Now, when you sent Exhibit 411 dated March 22, 2001, to Rob Taylor who was expressing concerns about log costs being too high, I want to make sure there's no doubt about this, no confusion, this was after both of those two discussions with Vicki McInnally?

A. I believe that's correct.

Q. All right. When Vicki McInnally told you what she had told you, did you think it was a Northwest Hardwoods management strategy to do what she said?

A. Why wouldn't I?

Q. Okay. So you believe that she was telling you what company strategy was?

A. She was part of the senior management team at the time.

Q. And the head of the senior management time was Rob Taylor, right?

A. That's correct.

Q. So if that was company strategy, why bother to send this message to Rob Taylor?

A. This message had nothing to do with our conversation. It had to do with the issues and the trends that were occurring in the business.

* * *

[Vol. 3-B (Apr. 10, 2003)] [Testimony of Paul Ehinger]

* * *

[Tr. 124] is here from Eugene. I think my direct is probably 20 minutes.

THE COURT: All right.

MR. HAGLUND: Plaintiffs call Paul Ehinger.

THE COURT: Mr. Ehinger, step right up and raise your right hand.

PAUL EHINGER

Was called as a witness on behalf of the Plaintiffs, was duly sworn and was examined and testified as follows:

THE COURT: Just be seated.

State your full name and spell your last name for us.

THE WITNESS: I'm Paul Ehinger. My last name is spelled E-h-i-n-g-e-r.

THE COURT: Thank you.

You may proceed.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Ehinger, it's my understanding that you've been in the wood products industry for approximately 50 years; is that right?

A. Yes, approximately, a little more.

Q. I misplaced my notes, so I am going to have to ask you –

THE COURT: Maybe you can shorten up the [Tr. 125] examination then.

MR. HAGLUND: I think that will happen, Your Honor.

BY MR. HAGLUND:

Q. Mr. Ehinger, could you briefly describe your experience.

A. Basically, I – my preparation was going to forestry school at the University of Michigan. Out of school, I worked for the Forest Service very briefly in Kentucky and Missouri. I then came out to Oregon and worked for a consulting firm for about two years. After that, I went to work for Edward Hines Lumber Company for 31 years.

I gave that up, then worked in an association working out problems in the industry between here and Washington, D.C., for the next three to four years. And then I decided to quit chasing my tail and went to work as my own private consultant to the industry.

Q. And while you were at Edward Hines Lumber Company, were you in senior management positions for most of that period?

A. 1965 to 1980, I was vice president, then senior vice president for the last seven or eight years in charge of all western operations.

Q. Now – and your consulting practice began when?

A. 1984, January.

Q. For a period of 10 years, between mid-1980s and [Tr. 126] mid-1990s, did you put out periodic reports on mill closures in the forest products industry in the Pacific Northwest?

A. I did.

Q. And what states were covered by that report?

A. The five western states: California, Oregon, Washington; Idaho, Montana.

Q. And have you continued to maintain the database regarding the entry into or exit out of the wood products industry since the last formal report that you did?

A. Yes. We maintain databases covering all the information basically that's contained in the report.

Q. Okay. Mr. Ehinger, I am going to put on the screen –

MR. HAGLUND: Perhaps the witness could be handed Exhibits 14 through 17, and 124 and 125.

(The clerk complies.)

BY MR. HAGLUND:

Q. Okay. Do you have Exhibit 14 in front of you there, Mr. Ehinger?

A. I do.

Q. And it's displayed on the screen here. What does this exhibit show?

A. It shows the location of timberlands in Washington primarily and a little bit of northern Oregon, plus location of the Northwest Hardwoods' alder sawmills.

Q. Now, does it also show timberland ownership as of some [Tr. 127] time in 2001?

A. Yes.

Q. Is the red – what's the red?

A. The dark red is Weyerhaeuser, the blue is the State timber, and there's a lighter color of pink shown down in Oregon which is Willamette Industries, and then it shows also yellow for Crown Pacific.

Q. Okay. One of the major landowners in Northwest Washington?

A. Yes.

Q. And also on the peninsula; is that right?

A. Yes.

Q. Now, can you – we see as of 2001 the four Northwest Hardwoods mills on this map. Could you point them out, going north to south.

A. Well, the north one is the Sedro Woolley mill. Arlington mill is the next one down. Then you drop down to the Centralia mill and then to the Longview mill. And then it catches the Garibaldi mill over on the Oregon Coast.

Q. So here's Longview, and if we go down to the bottom of the map –

A. On the left side –

Q. Right here?

A. – is Garibaldi.

Q. And there's Longview. Do we see large Weyerhaeuser [Tr. 128] tree farms in proximity to the Longview mill and the Centralia mills here and here (indicating)?

A. Yes.

Q. And that's the red that can be seen on Exhibit 14?

A. Right.

Q. The large Weyerhaeuser tree farms; is that right?

A. Yes.

Q. Okay. Now, turning to what's been marked as Exhibit 15, we see the same information, but now it's the State of Oregon. I'm going the wrong way here. Is that the case, Mr. Ehinger?

A. Yes.

Q. And we see the Weyerhaeuser land ownership in red and Weyerhaeuser alder sawmills with the large red dots?

A. That's right.

Q. What is the blue again, State of Oregon?

A. This is State of Oregon timber. The red is Weyerhaeuser. The pink is Willamette Industries.

Q. Who else – what other major –

A. And they don't show any Crown Pacific because Crown Pacific is all east side timber, and this is the State of Oregon.

Q. Now, if you look at – I'll zoom this up a bit – and is there another landowner that's being displayed on this map? If you look at the legend there.

[Tr. 129] A. Oh, yes. Georgia Pacific was holding land at that time.

Q. And is this part of their ownership in the Lincoln County area?

A. Yeah, the purple.

Q. The purple. Okay.

A. And then you get it down in the Coos/Curry County area down in the south edge of the map.

Q. Okay. And we see how many Northwest Hardwoods/Weyerhaeuser alder sawmills in Oregon as of the end of 2001?

A. Two.

Q. Garibaldi –

A. Garibaldi and Eugene.

Q. Thanks. Now, going on to Exhibit 16, what have you tried to display on this map?

A. This shows the existing mills, alder mills, in Washington. The open mills that are not owned by Cascade are shown in yellow. The red mills are the Cascade Hardwood

[sic] mills that we pointed out earlier. The black dots are the closed mills that have closed at that time and since that period of time.

Q. I think you said that the red dots are the Cascade Hardwood mills. Did you misspeak?

A. Northwest Hardwoods mills.

[Tr. 130] Q. Weyerhaeuser mills?

A. Weyerhaeuser mills, whatever you want to call it.

Q. Cascade Hardwoods is a competitor?

A. Yes.

Q. Okay. Now the black dots, I want to make sure this is understood, what are the black dots showing?

A. They represent hardwood mills that have closed in Washington since 1980.

Q. So this is a 21-year time span?

A. Yes.

Q. '80 to '01?

A. Yes.

Q. Okay. And as we go down, we also see a variety of closures, closed mills in the southern part of the state?

A. Right.

Q. Okay.

A. Yes.

Q. Let's shift now to Exhibit 17.

A. Yes.

Q. What are you trying to show here?

A. The same thing in Oregon, open mills, closed mills and Northwest Hardwoods mills. There are basically just

two Northwest Hardwoods mills, although the map catches the Longview mill up at the top center.

Q. Is this right on the Columbia River, which is obviously

[Tr. 131] part of the border between the two states?

A. Yes.

Q. Black showing closed mills north to south; is that correct?

A. Yes.

Q. And yellow, other open mills?

A. Right.

Q. Again, the same 21-year time frame?

A. Same time frame.

Q. Okay. That's for Exhibit 17.

Now, Mr. Ehinger, did you prepare a written list that is Exhibit 124, showing the number of closed hardwood mills in Oregon and Washington during this same 20-year period?

A. Yes, I did.

Q. And if we were to go back to 1980, how many operating hardwood mills were there in – well, how many closed in the last 21 years in Oregon?

A. Closed in Oregon would be 14.

Q. And if we look at Washington state?

A. 17.

Q. And those are all listed on this Exhibit 124?

A. That is correct.

Q. And have you listed their location?

A. The locations, I have listed the town which they're in [Tr. 132] and the identification of the year of closure that we could get.

Q. And that's out in the right-hand column?

A. Yes.

Q. And is Exhibit 125 a listing of the open hardwood mills as of –

A. 2001.

Q. And how many?

A. Seven in Oregon, eight in Washington.

Q. And of those 15, how many are Weyerhaeuser's?

A. Six of them.

MR. HAGLUND: Your Honor, we would move the entry of these exhibits, as they are supported by the data that Mr. Ehinger has testified to.

MR. SIMON: No objection.

THE COURT: 124 has already been received. 14 through 17 will be received.

MR. HAGLUND: I think 125 had already been received as well.

THE COURT: No, 125 has not.

MR. HAGLUND: Had not? Okay.

THE COURT: It will be received. (Plaintiffs' Exhibit Nos. 14, 15, 16, 17 and 125 received.)

BY MR. HAGLUND:

[Tr. 133] Q. Now, Mr. Ehinger, if you were to describe the change in the competitive landscape of the hardwood industry in Oregon and Washington between 1980 and 2001, how would you describe it?

A. Well, in 1980, the competitive nature was pretty loose, and by 2001 obviously it's gotten very tight, because of the expanding capacity of the existing mills, even though the curtailing of lots of mills, and the timber supply has not improved.

Q. Has the amount or number of competitors declined dramatically over this time frame?

A. Oh, substantially.

Q. If we were to total up the numbers on the exhibit we just presented, 124 and 125 –

A. I think it is 31.

Q. 31 have closed?

MR. SIMON: Objection, asked and answered.

THE COURT: The objection will be sustained. The exhibits are in evidence and he has testified to it.

MR. HAGLUND: Thank you, Your Honor.

BY MR. HAGLUND:

Q. Mr. Ehinger, I would like to ask you some questions about barriers to entering the alder sawmill business. Do you have an opinion about whether there are, as of the year 2001, barriers to entering the alder sawmill industry in [Tr. 134] this region?

A. They've substantially increased since the 1980 period when we started looking at this.

Q. How? Could you explain.

A. Number one, the timber supply is getting crowded by the mills and capacity simply because there are no more places for people to go to get the alder timber. Secondly, the cost of entering the business, building a mill and so forth, has gone up substantially.

And the thing that you have to look at is there are really two groups of mills here. There are the real small mills, which generally produce anywhere from two to seven or eight million feet a year. And then there are the larger mills, the substantial mills that are producing 25 up to 50 or 60 million feet a year.

The big mills all have planing mills, dry kilns and so forth to process material. Those small ones do not have them simply because they can't invest in them and they use common open market people who will surface timber, dry it and have it ready for market and ship it for you.

Q. Now, is the – you mentioned two. Is the presence of Weyerhaeuser a barrier to entry?

A. Competition is always a barrier to an entry in specific locations. And Weyerhaeuser, being very dominant and controlling 70 percent of the timber supply, is a [Tr. 135] consideration any time you're looking at starting a hardwood mill in Oregon or Washington.

Q. Now, have you actually provided, as part of your consulting work, advice to companies over the last 15 years that were looking at siting a sawmill, either softwood or hardwood?

A. Yes.

Q. Is that something you've done on a regular basis?

A. Yes.

Q. How important is an available timber supply to whether a new mill starts up in Oregon and Washington?

A. That's the number one consideration you have to give because you do not have the opportunity to source timber, there is little use in building a mill, so that is the number one. And those I work with, probably half of them are rejected very early in the game simply because there's no timber supply, whether it be hardwood or softwood.

And that also goes to the size of the mill. In other words, a person who is trying to build a 25 to 40 million foot production of alder lumber is crowding the marketplace, regardless if a fellow is going to produce five to ten million, fine, they can get by, or the ones that are even one to two.

Q. To build the size of the mill that you characterize as large to compete with Weyerhaeuser, what type of investment [Tr. 136] are you looking at?

A. 20 to $25 million, if you're building the complete mill yourself to produce that quantity of lumber.

Q. Did you –

A. And that's pricing new mill equipment, as opposed to getting old mill equipment or a mill that's being sold at auction or elsewhere.

Q. Did you act as a part of – did you provide some advice to a firm that was evaluating the potential of the Siletz Tribe using its Toledo mill to re-enter the alder business or the wood products industry?

A. They were interested – the instructions to me were what were the timber opportunities, to analyze the total timber opportunities in the area that would be tributary to a mill in Toledo or approximately in that area.

At the outside, the indication was given to me that people were considering the possibility of a hardwood mill, and I said, "Look, you can do a lot of things, but don't try hardwood. You're in a tough place, a hard location, and it's a difficult operation to manage." And I said, "That is the least likely type of operation that would have success."

Q. Okay. Now, there were some questions earlier regarding a chart that I think you were involved in.

A. Yes.

* * *

[Tr. 146] A. Roughly speaking.

Q. And you certainly would not say that Weyerhaeuser controls anywhere near that amount of the standing –

A. I agree with that.

Q. And if others were to say that the amount would be somewhere significantly less than seven percent, would that be a reasonable amount?

A. I don't know. I wouldn't respond.

Q. You'd have no basis to agree or disagree?

A. No.

Q. Okay. Do you still have before you Exhibit 15 and Exhibit 16 – I'm sorry, 14 and 15. Those were those maps of western Washington, that is Exhibit 14, and western Oregon, that's Exhibit 15. Do you still have those, sir?

A. 14 and 15 you want? Let me get the right glasses here.

Q. 14 and 15.

A. 14 and 15, I've got them.

Q. Okay. Now, you told us when you were answering questions to Mr. Haglund, with respect to Exhibit 14 for western Washington, what is shown there that's indicated in the legend, those are essentially the large industrial landholders, correct?

A. That's right.

Q. But there are a number of other landholders that have timberlands in Washington, correct?

[Tr. 147] A. Yes.

Q. That would include the Campbell Group? You're familiar with that?

A. There are all kinds of them there.

Q. And if I name several of them, tell me if I've got them right. The Campbell Group, Hancock, Champion, Rayonier–

A. I think Champion got rid of all theirs.

Q. Hampton, Simpson and Merrill & Ring, they all own timberland that has alder in Washington, correct?

A. I don't know whether they've got alder on all of them.

Q. They are timber owners?

A. They are timbers owners. Let's just leave it at that.

Q. All right. And with respect to Exhibit 15 in western Oregon, again, these are just the large industrial landholders that you have on your map?

A. These are some of the large industrial, yes.

Q. But there are plenty of other private landholders that have timberlands. And would those include Boise Cascade, Simpson, Stimson, Hancock, Moore Mill, Menasha Group and Roseburg Forest Products?

A. They all own substantial holdings.

Q. Now, the companies that I've named, they would also be considered large industrial timberholders, correct?

A. Yeah.

Q. May I ask you, sir, why those weren't included on the [Tr. 148] maps of Exhibits 14 and 15?

A. I didn't put the ownerships on the map.

Q. Who did?

A. I don't know. Mr. Haglund will have to tell you that. They came from Atterbury's ownership maps and they were obviously selected.

Q. And so you have no information about why these other large industrial landowners were not included on the map?

A. No.

Q. Now, Mr. Haglund asked you about your analysis of the hardwood mills that have closed since 1980, and you commented that there were 17 in Washington that have closed and 14 in Oregon that have closed?

A. Yes.

Q. And would you agree, sir, that there were a whole series of reasons why mills close, and perhaps if you have 17 mills that closed, perhaps 10 different reasons. Would you agree with that?

A. Very possible.

Q. And that's what you just told me last week, wasn't it, sir?

A. Yeah. But I think there was another thing when we talk mills, mills that I enter, two things that we want to be sure that everybody is clear on: Number one, they are mills that cut logs. They are not just cant mills or secondary

* * *

[Tr. 150] and if you would like to see the whole article, I'll make it available to you, but I don't think you'll need it.

A. No, just spit them out.

Q. Okay. In the year 2000, there's a quote attributable to you that says – connected with timber and mills.

"'All of the markets are down right now,' said Paul Ehinger, a Eugene, Oregon, consultant to the forest products industry. 'It's a matter of how big a problem you're willing to live with until the market comes back.'"

What did you mean by that, sir?

A. It really means – I'm sure you understand, you go and talk to a person for 20 minutes, and they pull one thing out which makes it difficult sometimes. But having said that,

actually how long the downturn was going to be and how deep the pockets were to be able to go through is one of the key things, because financial strength is one of the key things to the survivor of any operation.

Q. And the final quote – I'm going to ask the same type of question, sir. This was from 1998, about three years ago, Puget Sound Business Journal, here's the quote attributed to you.

"'People who are seeing problems now are people who are having management problems,' said Paul Ehinger, an industry consultant in Eugene, Oregon. 'Independent mills can do fine if they are well run and have good management.'"

[Tr. 151] What did you mean by that, sir?

A. Exactly what it says. I think it is self-explanatory.

* * *

[Vol. 4-A (Apr. 11, 2003)] [Testimony of Richard Zerbe]

* * *

[Tr. 3] (Apr. 11, 2003)

PROCEEDINGS

(Open court; jury present:)

THE COURT: Be seated. Good morning, ladies and gentlemen. I appreciate all of you being on time and ready to pay attention. You may call your next witness.

MR. HAGLUND: Plaintiffs call Dr. Richard Zerbe.

(Richard Zerbe was duly sworn.)

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Dr. Zerbe, I am going to cover your educational background, work experience, awards, professional associations and publications. I am going to do each of those categories in kind of a paragraph recitation and at the end of each component I would like to ask you if that's accurate. If I make an error, please correct me.

First, it is my understanding that you received your bachelor's degree in 1960 from the University of Oklahoma with areas of concentration in mathematics, general sciences and political science and that in 1969 you received your Ph.D in economics from Duke University?

A. That's correct. I would add that the mathematics included statistics.

Q. Okay. Now, with regard to your work experience, between college at Oklahoma and Duke you were a lecturer at [Tr. 4] Marshall University from 1964 to '66. You were also an assistant professor for three years from '66 to '69 at York University in Toronto, Canada.

Following the receipt of your Ph.D, you were then in succession a research fellow in law, in economics for two years, from '69 to '71, at the University of Chicago. You were a scholar in residence for the following year with the American Bar Foundation. You were an affiliated scholar for two years with the American Bar Foundation. And you were an assistant professor of economics for five years, from '71 through '76, at Roosevelt University?

A. That was an associate professor.

Q. Where is Roosevelt University?

A. It is in Chicago.

Q. Then you were a research associate – during that same period of time, you were also a research associate in the department of economics at the University of Chicago?

A. Correct.

Q. You were a visiting professor as well of economics, visiting associate professor at Northwestern University in Chicago during that same period of time?

A. Correct.

Q. Then beginning in 1981 or beginning in 1976, I'm sorry, you began work for the University of Washington and that continues to this day. During that 27-year period now, or [Tr. 5] 26 year period now, you have been the acting director of the program in social management of technology. You have been an adjunct professor in the department of economics. You have been an adjunct professor in the school of law for the last 12 years. And you are currently and for the last 20 years have been a professor in the Daniel J. Evans School of Public Affairs, all of those at the University of Washington in Seattle?

A. That's correct. I was also an adjunct professor in civil engineering for a period of time.

Q. Okay. Let me turn to just a few of a number of awards, grants or honors. You were on the council of law-related studies at Harvard in 1971. You were a research fellow in law and economics for the two years before that at the University of Chicago. And you were an Olin fellow or had an Olin fellowship at the Yale Law School in the fall of 1990. Is that right?

A. Correct.

Q. Now, turning to public service and professional associations. During your career you have served on the board of economic advisors to the economic committee of the ABA, American Bar Association, Antitrust Section and have served as a consultant to the Federal Trade Commission of the United States several months as a consultant in the Washington, D.C. office and over ten years consulting from [Tr. 6] time to time for the Seattle office for the Federal Trade Commission. Is that correct?

A. That's correct. I'm not sure exactly how many years I was consultant for the Seattle office, but roughly right.

Q. Okay. You are a member in terms of professional associations of several – two that I will mention are the American Economic Association and an associate membership in the American Bar Association?

A. I'm no longer an associate of the American Bar. I let that lapse.

Q. Go ahead.

A. Could I add –

Q. Sure.

A. I was a founding member of the American Law and Economics Association.

Q. And a past member of its board of directors?

A. Yes.

Q. Now, you have written widely in the field of law and economics, specifically antitrust law. Is that correct?

A. Including antitrust law.

Q. And for the last 23 years, you have been a senior editor of a publication entitled Research in Law and Economics and a Research Annual. The next volume due late this year or early next year is on antitrust law. Is that correct?

[Tr. 7] A. That's correct. I had been leading editor during that period.

Q. You have written dozens of articles, chapters in books throughout your career in the fields of law, economics and antitrust economics. Is that correct?

A. That's correct.

Q. And one of the earliest articles that you wrote which appeared in the law journal called The Journal of Law and Economics in 1969 was entitled the American Sugar Refinery Company 1887 to 1914, the Story of a Monopoly?

A. That's correct.

Q. You also wrote a follow-up article regarding monopoly and oligopoly in The Journal of Law and Economics?

A. That's correct.

Q. Now, Dr. Zerbe, were you retained by the plaintiffs to provide expert opinion on antitrust economics in this case?

A. Yes.

Q. Now, have you testified in any case in the last four years?

A. No.

Q. I would like to ask you, Dr. Zerbe, whether you have an opinion concerning whether alder sawlogs is an economically distinct market?

A. Yes.

Q. And what is that opinion?

[Tr. 8] A. That it is an economically distinct market.

Q. What is the basis for your opinion?

A. The fact that there are specialty mills for alder sawlogs. The fact that 95 percent of the hardwoods in the Pacific Northwest is alder. The fact that transportation costs for logs are high.

Q. Now, is there a geographic definition or component to what you describe as the alder sawlog market?

A. I believe I would describe it as western Washington and Oregon.

Q. So the geographic confines of the alder sawlog market in your opinion is western Oregon and western Washington?

A. Yes.

Q. Is that basically where the alder grows in the United States?

A. Yes.

Q. Predominantly?

A. There is some alder in Alaska, I understand, as well.

Q. A fairly small amount?

A. Yes.

MR. HAGLUND: Now, I would like to ask if the witness could be handed a jury notebook.

BY MR. HAGLUND:

Q. Professor Zerbe, if you could turn to Exhibit 400. This is a document that you reviewed as part of your [Tr. 9] preparation of this case?

A. Yes.

Q. And I want you to – for purposes of this next question, I want you to assume that within the time frame of 1998 through 2001 that Weyerhaeuser held a 64 percent or above share of the alder sawlog market as you have defined it. Based on keeping that assumption in mind, do you have an opinion about whether Weyerhaeuser has a monopoly power in the alder sawlog market?

A. I do.

Q. Could you tell the Court and the jury what that is.

A. Well, I believe that they have monopoly power in the alder sawlog market. Such a conclusion has been – given that market share, it is pretty standard.

Q. Now, in this situation with respect to the alder sawlogs, they have this large share of an input into a manufacturing process at alder sawmills. Is that right?

A. That's correct.

Q. You used the term monopoly power. Is there another term known in your field for this type of monopoly?

A. Yes.

Q. What is it and please describe what it means.

A. When there is monopoly power on the buying side. That is, when there is a single buyer, it is called monopsony. So there would be monopsony power, which is just monopoly [Tr. 10] power on the buying side.

Q. So at 64 percent or above, Weyerhaeuser has monopoly or as synonym monopsony power in the sawlog market?

A. Correct.

Q. Now, does there have to exist only one buyer or a buyer with this market share?

A. Just a buyer with this type of market share.

Q. Now, Weyerhaeuser has an expert in this case, Dr. Randall Pozdena. Have you reviewed all of the materials he has filed in this case regarding his opinions on the market definition and monopoly power issues?

A. I have.

Q. Now, Dr. Pozdena takes the position that because Weyerhaeuser does not own more than 7 percent of the alder – standing alder resource in Oregon and Washington that it cannot have monopoly power in the alder sawlog

market. You are familiar with that conclusion of his?

A. I am.

Q. Do you agree with it?

A. Absolutely not.

Q. Could you explain why.

A. It doesn't fit the definition, the textbook definition. Monopsony is you have – you are the sole buyer or you have buying power on the buying side. It has nothing to do with ownership of the resource. Any standard textbook shows [Tr. 11] this.

Q. So ownership of the resource when it is a monopsony on the buying side is not a condition of finding monopsony or monopoly power in that product market?

A. Absolutely not.

Q. I would like to give you a slightly different example. Let's take the situation of the orange growing region of Arizona. Let's assume for the moment that Sunkist is the sole processor of what are called juice oranges into orange juice in Arizona. Further assume that they own no orange groves themselves, but they buy 80 percent of all the juice oranges in Arizona and convert them into orange juice.

In that situation, does Sunkist have monopoly or monopsony power in the orange juice/orange market in Arizona?

A. They would, assuming that Arizona is a relevant market.

Q. Now, I would like to turn now, Dr. Zerbe, to the second market issue in this case. Do you have an opinion concerning whether the market for finished alder lumber is an economically distinct market?

A. I do.

Q. What is that opinion?

A. That it is.

Q. By "finished alder lumber" do we mean kiln dried and surfaced alder lumber?

[Tr. 12] A. Yes.

Q. What's the basis of your opinion, Professor?

A. Well, I have heard the other experts testify. I read their statements about alder's workability characteristics and looked at – the grading system for alder is different from any other hardwood. Primarily my opinion is based on the data.

Q. Now, you do not have a working background, in terms of your career, in the woods product industry?

A. That's correct.

Q. So you have read – you read the materials prepared by Mark Rasmussen in this case?

A. I have.

Q. As well as Paul Ehinger?

A. I have.

Q. As well as an expert that will be here next week, Dr. Philip Tedder?

A. I have.

Q. Did you listen to the testimony yesterday of Mr. Rasmussen and Mr. Ehinger?

A. I did.

Q. Did you agree with what they had to say?

A. Insofar as I had knowledge, I did.

Q. Now, I want to turn to the data and your analysis of it in a few minutes, but let me first proceed to first ask you [Tr. 13] to turn to Exhibit 409 in the juror notebooks. Is this an exhibit that you reviewed as part of your preparation to give testimony in this case?

A. Yes.

Q. Does it show that Weyerhaeuser, as of May 12, 2000, the date of this Weyerhaeuser document, is designating their market share of finished alder lumber at 75 percent?

A. Yes.

Q. That's noted in the third bullet up above as well as in the table below?

A. Correct.

Q. Now, I would like to ask you a hypothetical question, Professor. That is, assuming that during the time frame of 1998 through 2001 that Weyerhaeuser held a 75 percent or higher share of the market for finished alder lumber that you have defined, do you have an opinion about whether Weyerhaeuser held monopoly power in that market?

A. I do.

Q. And could you say what that opinion is and explain it.

A. The opinion is they would hold monopoly power in that market.

Q. Now, you have given this conclusion as to both markets, sawlog and lumber. As an economics professor with expertise in antitrust economics, could you explain to the Court and the jury what's the significance in terms, from an economics [Tr. 14] perspective, of a company having such large shares of a market that you would define as constituting monopoly power? What's the significance of monopoly power in the market?

A. Two: It gives them control of price, which increases profitability.

Q. Now, when you say control over price, what do you mean?

A. I mean control over both the price of sawlogs and the price of lumber, alder lumber.

Q. And taking the sawlog market, is that controlled to either increase the price for logs or decrease it?

A. Yes, it is.

Q. And likewise with finished alder lumber, the power to decrease it or increase it?

A. Yes, it is.

Q. Now, Dr. Zerbe, you heard Mr. Rasmussen yesterday describe a statistical analysis that was done. Did you and Mr. Rasmussen perform that analysis as a team?

A. We did.

Q. And what type of analysis was it?

A. Correlation analysis.

Q. And I would like to display what was displayed yesterday as Exhibit 85A.

Is Exhibit 85A a table showing the results of what you and Mr. Rasmussen did?

A. Yes.

[Tr. 15] Q. I have tried to zoom in on the first couple of columns. What did this analysis seek to do, Dr. Zerbe?

A. It seeked to determine the relationship between changes in prices of alder and other hardwoods.

Q. And what did the analysis show?

A. It showed that –

MR. SIMON: Objection, Your Honor. Cumulative with Mr. Rasmussen's testimony.

THE COURT: The objection will be overruled.

THE WITNESS: It showed the correlation of changes in prices wasn't small.

BY MR. HAGLUND:

Q. So in terms of the –

A. That is, one way to put it would be that changes in the prices of other hardwoods do not well predict changes in the prices of alder or vice versa.

Q. Could you explain how that is important to the conclusion you reached that finished alder lumber is in a distinct market from other eastern U.S. hardwoods?

A. Certainly. If they were in the same market, you would expect the correlation, the first differences, to be larger. You would expect there to be change in the pattern together. They don't.

Q. And that is shown in the column I have highlighted here?

[Tr. 16] A. Yes.

Q. And if they were highly correlated showing that they did track price together closely, those figures would all be close – much closer to 1.0 than they are to zero?

A. That's correct.

Q. Now, Dr. Zerbe, are you familiar with the literature that describes how a price correlation should be done – price correlation analysis?

A. I'm familiar with literature that talks about correlation analysis.

Q. Is there a particular author of an article that even Dr. Pozdena relied on that discusses how to do correlation analysis?

A. The article discusses market determination using correlation analysis.

Q. Who is the author of that article?

A. There are two authors. George J. Stigler and I think Mr. Sherman. Bill Sherman – Sherman.

Q. Do you know these individuals from your work in this field over the last 30 years?

A. I knew George Stigler very well. I worked with him. He was in Chicago. I have talked to him, gave lectures in his classes, talked about these kind of antitrust issues. He is now deceased.

Q. Now, Dr. Zerbe, Mr. Rasmussen used some charts [Tr. 17] yesterday to describe some things. I want to put on the screen some charts that you prepared. This is what has been marked as Exhibit 102, and it is entitled at the top and then I will zoom in: Correlation of Prices in Two Unrelated Industries.

Did you prepare this chart?

A. I did.

Q. And what was your purpose in terms – what were you trying to show with this chart?

A. I would make the following point: It is easy to find correlation prices that are close to one for goods that have no

relationship to each other. Any time you have prices that are trending upward, the correlation of the levels is going to be – usually would be high. Just because of the upward trend.

THE COURT: By "high," you mean the prices would be close together or far apart?

THE WITNESS: Not necessarily. I mean the correlation coefficient, that they would track would tend to be close to 1. It is the upward trend that gives it – would give that high correlation, Your Honor.

BY MR. HAGLUND:

Q. Now, in this top chart, you illustrate this point, and could you explain what you have shown here.

A. Yes. In the top chart you can see that there appears [Tr. 18] to be sort of some tracking between the red prices and the blue prices that is airline fares and poultry. But common sense would tell us that those aren't the same market.

When you look at the first differences, which are in this case, year-to-year changes in prices, and you look at the – I guess I'm getting ahead of your question, sir.

Q. In here, you are trying to examine two products that clearly are not in the same relevant market?

A. Yes.

Q. Airfares and poultry?

A. Yes.

Q. And if you just look at the way their prices are trending in this chart, what type of correlation do you get? Could you point that out.

A. It showed the intersection there between column 1 and column 2. It is the figure .938, which I would say shows high correlation.

Q. Now, does the Stigler article suggest that you can stop at this stage when you are trying to examine whether products are in the same market?

A. It suggests that you can stop at that stage if the correlation is low. That would suggest right at the start that they are not in the same market. But if the correlation is high, you cannot from that conclude that they are in the same market.

[Tr. 19] Q. And what then should you do, as an economist, to examine whether the products are in the same market? Would you explain what you then do and what you display in the bottom part of this chart.

A. Went to the second step, which in itself is also not definitive. The second step is to take the difference in the prices for both, in this case the airline fares and the poultry, and see if there is a correlation between the airline fares and the poultry. This is what was done in the Stigler/Sherwood article.

Q. Go ahead, sir.

A. The Stigler/Sherwood article often did this in terms of taking the logs and then taking the first differences of the logs. Some people – because it has an easier economic interpretation. I also did that for all of these hardwoods that were examined. The conclusion is the same.

Q. So when you say that you should examine the first differences, is that what you did in this lower chart on 102?

A. That's correct.

Q. And what does the correlation show?

A. It shows that there is no meaningful correlation. And what correlation there is, it is negative. .068, the brackets indicate, indicate a negative correlation.

Q. And having performed this first differences analysis, [Tr. 20] what conclusion are you able to draw regarding the

question regarding whether airline fares and poultry are in the same market?

A. That they are not.

Q. And is this the analysis that Mr. – you performed this same first differences analysis with Mr. Rasmussen and he described it in the chart as he displayed yesterday?

A. That is correct.

Q. I would like to ask you to now look at Exhibit 103, which I will also display.

Dr. Zerbe, could you explain what you were trying to show in Exhibit 103.

A. It is the same thing. I have two prices for airline fares and tomatoes. I did the same sort of analysis. You can see that if you look at the first chart, the two prices seem to track very well. If you look at the first differences, they don't track very well.

Q. So looking at the top chart, we see in the graphical illustration here that the prices seem to be moving together or fairly close?

A. Yes.

Q. And is the correlation coefficient that you calculated high?

A. It is. .94.

Q. Very close to 1?

[Tr. 21] A. Yes.

Q. But you can't stop there. And you went to the second step which is, again, what type of analysis?

A. Correlation of the first differences.

Q. And what does the chart show here when one plots the first differences?

A. Well, you can see they don't seem to track very well, the two prices.

Q. And what does the calculation for the correlation coefficient show?

A. It shows that the correlation is negative, about .3.

Q. So, Dr. Zerbe, based on this analysis, are airline fares and tomatoes in the same market product?

A. They are not.

Q. If one returns to the Exhibit 85A and examines the correlation coefficient for alder superior compared to the top grades of those 17 species, are the correlations high or low once you do the first differences analysis?

A. They are low.

Q. Those 17 hardwood species are not in the same, relevant product market as alder?

A. That's right. In the Stigler article, when they are talking about items in the same market, they are talking about correlation coefficient, first differences or the – or using the logs. Either way, they are talking about .9, [Tr. 22] .8 maybe, high correlation coefficient.

Q. In your opinion, you need to be in the .8 to .9 area on a first differences analysis to come to the conclusion that the products are in the same market. Is that correct?

A. It sounds about right, yes.

Q. Now, I forgot to ask a couple of questions, Dr. Zerbe. You stated earlier that you examined the materials that Dr. Pozdena has filed in this case that detail his testimony, his opinion regarding whether alder lumber is in the same market as other eastern hardwood species. Is that correct?

A. That's correct.

Q. And he concludes that they are all in the same market. Is that right?

A. That's right.

Q. When it comes to this correlation analysis, how many steps did Dr. Pozdena perform?

A. Well, he performed two.

Q. And what were those?

A. First, he correlated the price levels. Then he skipped the correlation of the first differences and moved to something which he called removal of the common factor.

Q. Did he follow the economic methodology correctly?

A. No.

Q. So you stand by your opinion that they are not in the [Tr. 23] same market, alder –

A. I do. There are three steps. You correlate the levels, you correlate the first differences, and only then do you go on and talk about whether or not there is a common factor. Because you could have a high correlation/level of first differences and have it explained by some common factor.

Q. So let me make sure I understand. Under the literature there, there can be up to three steps of a price correlation analysis?

A. There could be more. But there could be those three, yeah.

Q. And if you have a low correlation, at any one of those stages you stop and conclude they are not in the same market?

A. That's correct.

Q. Do you skip a step?

A. No.

Q. Is there any support in the literature for what Dr. Pozdena did?

A. There is not. In the Stigler/Sherman article it makes it clear that you don't go considering the common factor before you calculated the first difference. It is only after you have done that that you do that.

Q. And Dr. Pozdena's materials refer to the Stigler [Tr. 24] article?

A. Yes, they do.

MR. HAGLUND: Your Honor, we move the entry of 102 and 103.

THE COURT: Any objection?

MR. SIMON: Cumulative with the expert's testimony?

THE COURT: They will be received, 102 and 103.

(Exhibits 102 and 103 were received.)

BY MR. HAGLUND:

Q. Dr. Zerbe, as part of your preparation to testify here, did you review a number of articles and speeches prepared by Weyerhaeuser's top executives in the two or three years ending in 2001?

A. I did.

Q. And did you review Exhibit 466, an article by Richard – let me start over. Did you review Exhibit 466, an article by senior Weyerhaeuser vice president for timberlands in the Western Forester. If he could be handed 466, 469, 470 and 472. Go ahead and take a minute to make sure that those are among the speeches or articles by Weyerhaeuser senior executives that you looked at.

A. I looked also at some material from Mr. Hanson that I don't see here.

Q. 466 should be one by Mr. Hanson, and I think you're [Tr. 25] right, I failed to ask that you be handed 471, which is another article by or a speech by Mr. Hanson.

Professor, did you look at those in preparing to give testimony here probably some months ago?

A. I did.

Q. Now, calling your attention to Exhibit 466, the second page of that exhibit.

A. That's the one with the Western Forester logo at the top.

Q. This is an article by senior vice president of Weyerhaeuser Richard Hanson. Do you have that now?

A. Yes, I do.

Q. I would like to call your attention to the second page of the article from the November/December 2000 issue and ask you to look at the section called Consolidation and the first paragraph which states: Forest products is still one of the most fragmented of all industries, and fragmentation creates inefficiencies that hurt profitability.

What does that suggest to you, Professor?

A. The paragraph?

Q. Yes.

A. The paragraph speaks of the need for consolidation. It says the company must choose between being a consolidator and a consolidatee.

Q. You are referring down lower to what I have [Tr. 26] highlighted?

A. I would interpret that to have a large market share or to exercise market control.

Q. You would interpret that – I didn't quite hear that.

A. That, I would interpret that as the desirability of having large market share.

Q. And what's the purpose of having large market share in any segment of a market?

A. Being able to control a price.

Q. Being able to control price has what impact on profitability if you are successful in raising price? What's the impact on profitability?

A. It can increase profitability.

Q. Now, turning now to one other of those articles, Dr. Zerbe, I'm going to ask you, if you would, find Exhibit 472?

A. Yes.

Q. Is this a copy of a speech by Steve Rogel, chairman, president and CEO of Weyerhaeuser pulled off of their Web site that was given to an industry association in October of 2001?

A. I don't know all that. All I know it is identified as remarks by Steve Rogel.

Q. At the end of that line, does it show October 15, 2001?

A. Yes, it does.

[Tr. 27] Q. Now, I would like to turn to page 2 and go down to the bottom part, the bottom probably quarter of that page. Have you reviewed this section of this speech by Mr. Rogel in which he talks about the positive character of consolidation?

A. I have.

Q. And does he make reference to – as you look at this here, he talks about what has been going on in the European pulp and paper industry between 1974 and 2000. Is that right?

A. That's correct.

Q. What's he saying here?

A. Well, as we often see, the words here are: These marginal producers have long made it hard to avoid price wars and demand for paper has fallen.

Q. He is quoting with approval something from a magazine called The Economist just after he has talked about that even after several bouts of consolidation –

THE COURT: Point it out on the screen and let him look at the screen. It would be easier.

MR. HAGLUND: Sure, Your Honor.

BY MR. HAGLUND:

Q. He is making that comment about The Economist just after he has discussed what, Dr. Zerbe?

A. The problem, the fragmentation in the industry, the [Tr. 28] lack of consolidation.

Q. And is he discussing the fact that there has been significant consolidation in the pulp and paper arena in Europe but still not enough?

A. Yes.

Q. Now, let me ask you a couple of follow-up questions. In a competitive market, Dr. Zerbe, with lots of producers, could you briefly explain what happens to prices given the laws of supply and demand in a competitive marketplace?

A. Well, supply and demand determine the price. An individual producer has no control over the price.

Q. So if we look at the last part of this article where it talks about avoiding price wars when demand for paper has fallen, in a competitive marketplace where demand – where the condition is falling demand, what should happen to prices?

A. Price will fall; you can't avoid it.

Q. In a marketplace dominated by one or a few large companies, where demand is falling will that condition prevail, prices fall?

A. Prices may fall.

Q. If one company is dominant, will they fall?

A. Prices may fall.

Q. Does the dominant company have the ability to avoid the fall in prices?

[Tr. 29] A. Yes.

Q. Dr. Zerbe, based upon your review of the Weyerhaeuser senior executive speeches, what's your opinion about their objectives in any of the wood product market segments in which they compete?

A. In general, taking all the statements together, they are consistent with the policy of gaining monopoly power and gaining industry control.

Q. Now, yesterday you heard the testimony of Paul Ehinger, and I want to specifically ask you – you heard his testimony regarding barriers to entering the alder sawmill business in the Pacific Northwest?

A. Yes.

Q. I want to call your attention and ask you some questions about one of the particular factors or barriers he mentioned. That was the dominant presence of Weyerhaeuser in the alder industry in Oregon and Washington. My question for you, Professor, is: Is there any recognition in the antitrust economics literature about a dominant firm being a barrier to entry into that market?

A. Yes. It is a recognized barrier.

Q. Could you explain why.

A. Well, it is really common sense. If you have reason to believe that the dominant firm is in a position to squeeze your margins, then that makes entry problematical.

[Tr. 30] Q. And when you use the word "problematical," what do you mean?

A. Risky.

Q. And in your judgment, based upon your assessment of – I will withdraw that.

MR. HAGLUND: Thank you very much, Dr. Zerbe. No further questions.

THE COURT: Cross-examination.

MR. SIMON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Good morning, Dr. Zerbe. Michael Simon. Good to see you again. In your discussion with Mr. Haglund, when he was asking you about the example with the Sunkist oranges, in a grocery store like we all might go to, are Sunkist oranges different from other oranges?

A. Not as far as I'm aware.

Q. If the price of Sunkist oranges were to go up, would you expect consumers to switch to other brands of oranges?

A. I would expect some switching, yes.

Q. As a matter of fact, if the price of oranges generally went up, would you expect that some consumers would switch to other types of fruits?

A. There would be some switching but less, much less.

Q. In the discussion of your background that you gave to

* * *

[Tr. 35] A. It makes it more difficult.

Q. Very good. Now, if you don't have data that will permit that, then one can use a regression analysis in order to adjust for those type of common trends like inflation, can't you?

A. The difficulty is identifying all the possible common factors.

Q. But it can be done with appropriate regression analysis?

A. If you can identify all the common factors.

Q. And correlation of residuals is a type of regression analysis, am I correct?

A. Correlation residuals is a type of regression analysis.

Q. Thank you, sir. You stated that the presence of a major or dominant firm can be a barrier to entry. Did I hear that correct?

A. You did.

Q. The reason for that is what, sir?

A. Well, as I stated, it is particularly the case. If you think the dominant firm is in the position to make your operation less profitable or even unprofitable.

Q. If a dominant firm achieved its position of dominance or its market share it has because it is either more efficient or better run, that ultimately is in the interest of consumers, am I correct?

[Tr. 36] A. Well, you have a trade off here it, don't you? It is not necessarily in the interest of consumers.

Q. Is the underlying purpose of our antitrust laws to protect consumers?

A. Yes.

Q. Is it helpful to consumers or harmful to consumers to encourage firms to be more efficient and better run?

A. It is helpful.

Q. Do you believe that a firm that is efficient and better run is a barrier to entry to a poorly run or poorly managed entrant?

A. Yes.

Q. Anything wrong with that?

A. What do you mean by wrong?

Q. I will move on. With regard to your opinion regarding lumber, if I heard you correctly, if I heard you correctly you said you believed that finished alder lumber is an economically distinct market or a relevant market. Did I hear that right?

A. Yes.

Q. Now, in fact, when you prepared your expert opinion on this matter and when you gave a deposition to me, this was your opinion: That there is a relevant market for hardwood lumber that is international in scope but you believe that there was a submarket for finished alder lumber. Do I have

* * *

[Tr. 46] paragraph. I'm not going to read it out loud. I prefer you not read it out loud, but I'm going to ask you a question when you are done. Take a look at page 802, please. It is numbered in the bottom right-hand corner as 802. Do you see that page?

A. Yes, I do.

Q. Read the top paragraph to yourself, please, and let me know when you are done.

A. Yes.

Q. Now, does that refresh your recollection that you were informed by your research assistant, Mr. Bellis, that the Siletz Tribe's mill has been maintained so it may start operations if market conditions become favorable?

A. Yes, it does.

Q. Did you or Mr. Bellis draw the conclusion from that that presents a difficult issue for this case?

A. I don't think we drew that conclusion.

Q. Did you or Mr. Bellis draw the conclusion that if the mill can be maintained in a condition so it can start operations when conditions are good, Weyerhaeuser would have to continue to engage in its challenged actions indefinitely?

A. That's Mr. Bellis' words, not my words.

Q. You are aware, are you not, Dr. Zerbe, that when there is a downturn in lumber prices, stumpage owners or the [Tr. 47] owners of standing timber, begin to take their trees off the market. You are aware that's a phenomena that occurs, aren't you?

A. It is a logical assumption. I'm not aware of the practice.

Q. Let me ask you from that logical assumption if is the following a correct economic conclusion: If there is a downturn in lumber prices and the stumpage owners or standing timber owners take their trees off the market, would you agree that those trees coming off the market would cause an increase in the price, whether the stumpage price or the log cost?

A. If the logs – if the timber was in the market in such a way that it affected the supply of available timber, and if that supply was then taken off the market, then it would tend to increase the price.

Q. And under those circumstances log prices could increase even though lumber prices were decreasing, under the circumstances you just described, am I correct, sir?

A. That's possible.

Q. With respect to your testimony regarding monopoly, let me talk about monopoly first. Then I am going to come to monopsony.

With respect to your testimony regarding monopoly, did I hear you correctly say to Mr. Haglund and the Court

* * *

[Tr. 61] with prices going down. Of course, both – it could be happening for both reasons at the same time.

Q. So the answer to my question would be yes?

A. Yes.

MR. SIMON: Thank you, sir. Nothing further.

THE COURT: Further questions?

MR. HAGLUND: No, Your Honor.

* * *

[Vol. 4-A (Apr. 11, 2003)] [Testimony of Ludwig Rabold]

* * *

[Tr. 80] mills who wanted to retain it?

A. Uh-huh.

Q. The PLIB did not go, at least in the last 20 or 30 years, did not go to the Northwest Hardwoods mills on a regular basis to do any inspecting or grading or checking of the Northwest Hardwoods product at their mills?

A. Not since the proprietary grade. But I have done – when you mentioned it earlier, I have done with Northwest Hardwoods at the beginning, yes.

Q. And that was –

A. On a monthly basis.

Q. That was quite a while ago?

A. That was in '76. I'm not sure when that switch was made.

Q. After Northwest Hardwoods came out with its proprietary grading system, no more after that?

A. No, sir.

Q. So only on occasion would you see some of the Northwest Hardwoods' product when another mill or customer would ask for your help in evaluating that?

A. That's correct.

Q. On occasion other mills, including Ross-Simmons, would bring on board or buy Northwest Hardwoods' proprietary graded product to ask for help in understanding that. Am I correct?

[Tr. 81] A. Pretty much so.

Q. Now, it is correct that most of the other hardwood mills that make alder lumber in the area try to copy or emulate Northwest Hardwoods' grading systems, correct?

A. I don't know how to answer that. That was a mill's choice.

Q. Was that your perception, that that's what most mills you were working in were doing?

A. Yeah, I would say that. But like I said, it is like Ross-Simmons. Ross-Simmons, they had two different grades than what Northwest Hardwoods had. It was a custom cabinet and then the comm. shop.

Q. With respect to the concept of proprietary grading, the idea there was to deliver what the customer really wanted?

A. Yeah.

Q. And to deliver it consistently?

A. That's right.

Q. And that's why we have the proprietary grades?

A. Yeah.

MR. SIMON: Thank you. Nothing further.

THE COURT: Any further questions?

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Based on your experience, is it true that some customers preferred alder lumber that was knife planed [Tr. 82] rather than abrasive planed?

A. Yes.

Q. Is it a fair statement that an abrasive planer hides more defect from the grader than a knife planer?

A. I wouldn't call it a defect. I would call it – let's say, for instance, you get the pin knots. It is not a defect, but it is a mill's choice – how should I say that – lumber sense. In other words, you have several pin knots, the orders of invoice depend on that fact. So how many can we have on a board? Sometimes you find the pin knots scattered all over the board. That's a mill choice that we only have a few.

Some mills are probably harder; some mills you don't or probably separate that. That was probably tougher to spot on the abrasive machine over the knife planer. The other thing, the skip is more apparent on the knife planer than the abrasive machine.

Q. What is skip?

A. Skip is a roughness that is on the surface or sanded off. The little undersides or whatever you have, then you have that roughness showing.

Q. It is an abrasive plane –

A. All it is, it is a little touch over the area. It covers a little. It is more apparent on the knife planer.

Q. Okay. Take stain in alder lumber –

[Tr. 83] A. Stain, blue stain, you can see that on both abrasive and also knife planer. Not much difference there.

Q. Stain does lower the value of the lumber product?

A. Oh, yeah, definitely.

MR. HAGLUND: Thank you. No further questions.

MR. SIMON: Nothing further.

THE COURT: You may step down. Thank you, sir. Call your next witness.

* * *

[Vol. 4-A (Apr. 11, 2003)] [Testimony of Mel Kayser]

* * *

[Tr. 83] MR. HAGLUND: Plaintiffs call Mel Kayser.

(The witness was duly sworn.)

MR. HAGLUND: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HAGLUND:

Q. Mr. Kayser, are you here pursuant to a subpoena?

A. Yes, I am.

Q. Did you have foot surgery yesterday?

A. Yes, I did.

Q. I appreciate your coming in despite that. It is my understanding, Mr. Kayser, that you graduated from high school in 1952 and immediately went to work in the woods, spending 46 years with ITT Rayonier or Rayonier Company in various logging and log-buying positions; that you retired but then worked for 14 months for Wasser and Winters as a log buyer in '99; and then for approximately a year and a half, part of '99 until September of 2000, you were a log [Tr. 84] buyer for Ross-Simmons in Longview. Is that all correct?

A. No. In the beginning, I did work for ITT Rayonier until about the last ten years. Before that I was self-employed contract logger.

Q. Okay. So from '52 to '89 you were ITT Rayonier?

A. No. I worked independently from '52 until like '82. Then I went to work for ITT.

Q. I really messed it up. Thanks. So '52 to '82 you were a contract logger?

A. Correct.

Q. In what area of this region?

A. Southwest Washington.

Q. So have you logged all over southwest Washington?

A. And up into the Mount Hood National Forest.

Q. For that 36 years?

A. Correct.

Q. Then you were a quality control wood supervisor and log buyer for ITT Rayonier?

A. Correct.

Q. Now, I would like to ask you some questions about the experience you had at Ross-Simmons. That was 18 months of its last two years of operations?

A. Correct.

Q. And where do you live, sir?

A. In Castlerock, Washington.

[Tr. 85] Q. Now, were there problems procuring logs for the Ross-Simmons Longview operation when you worked at the company?

A. In the beginning, no.

Q. What problems developed thereafter?

A. Later on the problems developed. The payment to their loggers was the problem.

Q. How so?

A. They didn't pay their bills.

Q. What impact did late payment to loggers have on your ability to source logs in the last year and a half?

A. They went somewhere else.

Q. Did that affect the quality of the logs that you were able to procure for Longview at – Ross-Simmons at Longview?

A. No. Basically we procured the same quality of material we had before, but we had a little more problem procuring the volume.

Q. Did you have to buy higher prices partly because of that problem?

A. No.

Q. Who was Ross-Simmons' primary competitor?

A. Weyerhaeuser – Northwest Hardwoods and Cascade Hardwood. Cascade Hardwood always paid more than anybody else.

Q. Now, your direct competition was – also included the [Tr. 86] Northwest Hardwoods mill at Longview?

A. Correct.

Q. Now, you knew who the log buyers were at Northwest Hardwoods?

A. Absolutely.

Q. And you had known them from years before in the logging business?

A. From years I sold logs to them when I was with Rayonier.

Q. Now, in your experience over all those years, have you observed log buyers from Northwest Hardwoods increase their original bid in the face of a competing bid from you or another supplier?

A. That's just about a standard operating practice. In other words, the people who own the wood market, it is just like anything else. You market it. If you don't do a good job

marketing it, you give away the wood. What they will do, they will have a log buyer come out and offer so much.

They call the next log buyer and come out, and they never tell you what the other guy says. They will say: What are you willing to pay for it? They will tell them. They go through this circuit and come back and say: You guys are a little short; maybe you could come up. Sometimes you come up. Other times you look at the quality and it wasn't there, and you say: Their profits are deeper than [Tr. 87] ours; they can have it.

Q. During these years of experience relative to Northwest Hardwoods, did you see their log buyers increase their original bid as a supplier went around this circuit of shopping their wood?

A. No, I have never seen Weyerhaeuser – Weyerhaeuser was always pretty firm. If they say basically $60 a ton as price, they say $60. You couldn't get any more than $60 out of them. They were set.

Q. When you were at Ross-Simmons, did you observe Northwest Hardwoods' log buyers increase their bids above the first bids they made?

A. No.

MR. HAGLUND: No further questions.

THE COURT: Any cross-examination?

MR. SIMON: Yes, please.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Good morning, Mr. Kayser.

A. Good morning.

Q. If I heard you correctly responding to Mr. Haglund, you said in terms of procuring logs for Ross-Simmons, in

the beginning it wasn't a problem for Ross-Simmons, correct?

A. Correct.

Q. And then about when would you say the problems really [Tr. 88] began? What time period? Year or month if you can possibly give us that.

A. The month was in June. I'm not sure – 2000. I think it was 2000, in June.

Q. And you are aware that Ross-Simmons closed its operations in May of 2001, correct, sir?

A. Yes, sir.

Q. What started happening in June 2000 that caused these problems? What were you observing?

A. Well, how I become aware of the problem was I got a phone call from the vice president of timber at Longview Fiber and told me he was shutting off our logs because of a lack of payment.

Q. What did you do about that?

A. I went to the office and checked to see that – I didn't doubt his word for one second. I went to the office and asked what was going on and they said: Yeah, we are a little behind.

Q. Now, Longview Fiber had a history of supplying – of having a supply relationship with Ross-Simmons, am I right?

A. Right.

Q. Would you tell us about that history. Before the problems arose in June of 2000, what was the good history between Longview Fiber and Ross-Simmons?

A. Well, Longview Fiber bought the chips from [Tr. 89] Ross-Simmons, and it was pretty handy because they were only a couple, 3 miles away. They could get chips if they

needed them instantly. Of course, Longview Fiber wanted to see Ross-Simmons stay in business because of the competition.

Q. I take that there were no problems that you were aware of with the Longview Fiber supply relationship with Ross-Simmons until June, 2000?

A. That's when I became aware of it.

Q. Now, with respect to the log purchasing that you observed, and before that in your role as a logger, are you aware generally what happened to log prices, alder log prices between 1990 and 2000?

A. Oh, yeah.

Q. What happened to them?

A. Well, they continued to go up because of the law of supply and demand. Alder is not a crop you jump into. It is a subspecies, and there is a limited supply of it.

Q. You mentioned, in responding to questions from Mr. Haglund when he asked who were some of the other major competitive buyers out there for alder logs, you mentioned Northwest Hardwoods and Cascade. I wrote down Cascade always paid more than anybody else. Would you expand on that. What did you mean by that? What did you observe?

A. Well, being in the log buying business, we never were able to figure out Cascade because there was no rhyme nor [Tr. 90] reason as to what they would pay. One day they would offer a small amount; the next day there was no limit to what they would offer. Their log buying practices is helter-skelter.

Q. What type of effect did that have on Ross-Simmons as far as you could observe?

A. Well, if they wanted a particular parcel of timber and the logs come off it, it didn't look to us like money was no object. They just went after it and they were going to get it.

Q. That put pressure on Ross-Simmons' prices –

A. It forced the price up for everybody. It forced the price up.

Q. That would include Northwest Hardwoods, too?

A. Northwest Hardwoods had to pay more if they wanted it, too.

Q. There has been some talk in this trial about the issue of staining with respect to alder logs. Would you tell us what you know in terms of log buying and how long logs can basically be stored and what one can do to try to lengthen the time that one can store a log?

THE COURT: Is this part of the direct? Let's get on with this case.

BY MR. SIMON:

Q. With respect to, Mr. Kayser –

THE COURT: I will make my own objection on that.

[Tr. 91] MR. SIMON: I understood that to be such, Your Honor.

BY MR. SIMON:

Q. You have told us about Ross-Simmons competing for logs against Cascade. How is the relationship between Ross-Simmons competing for logs against Northwest Hardwoods/Weyerhaeuser?

A. Northwest Hardwoods wasn't as hard to compete with as Cascade because they had their own supply. Then they just bought outside logs to fill in for the volume needed. They were never as aggressive as Cascade.

Q. Now, before the problem started, before the June, 2000, problems, who were the major suppliers of logs that you bought from or that Ross-Simmons bought from besides Longview Fiber. You told us about them. Who were the others?

A. We bought from Campbell group. We bought from Champion International. We bought from several large private landowners. Basically those were how we sustained our volume coming into the mill.

Q. Based upon your observations, did you ever see anything being done by Northwest Hardwoods or its log buyers that you considered anticompetitive or out of line in any way?

A. No, nothing out of line. The only thing I can say is when I sold logs for Rayonier, I sold to both Ross-Simmons [Tr. 92] and to Northwest Hardwoods. I, at times, did have the Northwest Hardwoods buyer tell me that he would just as soon I sold my logs to Ross-Simmons because they had ample supply of wood. But they always thanked you for the opportunity to bid on it and what have you. But he would say: Well, we just as soon see you sell it to Ross-Simmons.

MR. SIMON: Thank you, sir. I appreciate your time.

THE COURT: Further questions?

MR. HAGLUND: Yes.

REDIRECT-EXAMINATION

BY MR. HAGLUND:

Q. When you were with ITT Rayonier, isn't it true it was common for log buyers in the alder industry to bid back and forth for a particular supplier's wood?

A. Specifically ITT's or overall?

Q. Overall.

A. I really didn't get too concerned about overall. All I was concerned about was marketing the wood for ITT.

Q. Do you remember being deposed by Mr. –

MR. SIMON: Ms. Markley.

BY MR. HAGLUND:

Q. Ms. Markley back in last September?

A. Yeah.

Q. And I want to read a question and answer. Page 29,

* * *

[Vol. 4-A (Apr. 11, 2003)]
[Testimony of Wayne Demarest]

* * *

[Tr. 95] did you source logs for?

A. Longview.

Q. Did you supervise any of the log procurement for the Joint Venture in Toledo?

A. No, I did not.

Q. Were you aware of what was going on in connection with the sourcing of logs for the Toledo mill?

A. Yes, I was.

Q. If you could, Mr. Demarest, could you generally describe the typical process that a logger or landowner goes through when they have alder logs to sell?

A. Normally they would contact one or more of the hardwood sawmills, if they have strictly alder to sell, the alder. If it was mixed in, you get prices and sell to the highest bidder.

Q. Is it a fairly common practice for them to shop the wood around the circuit more than once?

A. Oh, yeah. Yeah. Depending on their location, I suppose.

Q. Very common practice?

A. Yes.

Q. Now, while you were at Ross-Simmons, who was your primary competition?

A. Northwest Hardwoods in Longview.

Q. Did you compete with any of the Northwest Hardwoods [Tr. 96] mills outside of the Longview mill?

A. Centralia and Garibaldi.

Q. Based upon your experience and observations, was it your perception that log buyers from the Northwest Hardwoods mills at Longview, Garibaldi and Centralia were willing to increase their original bids in the face of a competing bid from you?

A. That was my perception.

Q. You observed that in the marketplace?

A. Yeah.

Q. Now, what did you observe about the conditions or what happened in the log market in the Toledo area that you observed during the '96/'97 time frame?

A. Without knowing the log prices prior to that, I would say they were $100 to $150 higher than the Longview area.

Q. Did you have discussions with Mr. Nelson about this problem?

A. Excuse me?

Q. Did you have discussions with Bill Nelson about this problem?

A. Nothing to any length. I was aware of it because we shared an office.

Q. You and Bill Nelson were actually in the same room?

A. Same room.

Q. Two different desks?

* * *

[Tr. 99] MR. SIMON: We will have this up on the screen very briefly, Your Honor.

THE COURT: Yes.

BY MR. SIMON:

Q. This is a letter that you sent to log suppliers dated June 17, 1998?

A. Yes.

Q. You sent it when you were working for the Ross-Simmons Hardwood Lumber Company?

A. Yes.

Q. The first sentence reads: As a result of adverse market conditions, Ross-Simmons hardwood is forced to begin curtailing log deliveries at the Longview mill.

What were the adverse market conditions, sir, that you were referring to in this letter?

A. I don't recall.

Q. Is it correct, sir, that at this time Ross-Simmons was having difficulty selling all of the lumber that it was making as a result of the Asian economic crisis that beganthe year before?

A. That's possible.

MR. SIMON: Thank you. Nothing further.

THE COURT: Any further questions?

MR. HAGLUND: No, Your Honor.

THE COURT: You may step down. Thank you. Call

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[Vol. 4-B (Apr. 11, 2003)] [Testimony of Sonny Powell]

* * *

[Tr. 5] A. That's surface to finish lumber.

Q. And who was the person who handled the pallet sales primarily?

A. John Hand.

Q. Now, during the time that you were sales manager for Ross-Simmons, did the company have a proprietary grading system?

A. Yes, we did.

Q. And were those in an effort to basically copy the system Northwest Hardwoods had in place?

A. Yeah, basically. It was a product that they started developing, then we developed our own, and was to get a better product to the end user.

Q. And you had quite a number of grades that were very similar to Northwest Hardwoods' but with slightly different names?

A. Yes.

Q. And you also had some of your own grades that were slight variations of theirs?

A. Yes.

Q. Now, during the 1990s, through the time that the mill closed, how would you compare the quality of Ross-Simmons lumber to that of other competitors in the marketplace?

A. We were always competitive.

Q. Pardon me?

* * *

[Vol. 4-B (Apr. 11, 2003)] [Testimony of Steve Fitzgerald]

* * *

[Tr. 21] assuming, yes.

Q. Okay. Do you have any recollection of what you were referring to in that sentence, sir?

A. At this time, I really don't. That's why I take notes, I need them.

MR. SIMON: I have nothing further.

THE COURT: Any further questions?

MR. HAGLUND: Just one question.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. There were curtailments during your time at STEDCO?

A. Oh, yes.

Q. Due to lack of logs?

A. Due to lack of logs.

MR. HAGLUND: That's all.

THE COURT: You may step down. Thank you.

* * *

[Vol. 4-B (Apr. 11, 2003)] [Testimony of William Blaney]

* * *

[Tr. 38] deciduous, the leading alder; the conifer they would keep for themselves.

And the others would be other small business programs, other small private landowners that we would purchase alder from as well. The International Forest Products, they potentially had a lot of alder associated with some of their licenses up at the north end of Vancouver Island. And we didn't actually have an agreement with them. We purchased a small volume from that, but at the time when Coast Mountain was sold, we hadn't really culminated that agreement in full.

And Western Forest Products, was the same situation. They were located up at Fort McNeil, the north end of Vancouver Island, and they had some very nice alder stands over on the east coast of Vancouver Island, which we were also negotiating for, but, again, never really saw any of that wood come in, but it certainly was a potential purchasing source for the company at that time.

Q. Okay. Turning to the lower part, MacMillan Bloedel was purchased by Weyerhaeuser in '99?

A. Yeah. I believe that was the year that sale went through, yes.

Q. And down below, you show the potential coming from your licenses. Is there some flex in the utilization of your licenses?

[Tr. 39] A. Yeah. The utilization of the licenses in any one year, licenses on the coast – well, licenses in the province volume-based tenures have annual allowable cut that you can take in any one year. Then you have to balance plus or minus 10 percent in five years, and then in any one year of harvest, you can be plus or minus 50 percent.

So depending on when the cutting permits were issued and when the actual licenses started, we may have had to, you know, accelerate the harvest in some years in order to balance, you know, at the end of five years, plus or minus 10 percent.

Does that answer your question, Mike?

Q. Yes, it does. Now, relative to these licenses, all five are exhibits in this case, is each – if I am referring to 309 through 313, is each exhibit approximately a 20-page document that is a contract with the provincial government, each of your licenses?

A. Each of our licenses is a contract with the government, that's correct.

MR. HAGLUND: If he could be handed those.

BY MR. HAGLUND:

Q. I don't know that you'll need to look at them, but, Mr. Blaney, are these exclusive contracts to harvest that annual allowable cut within that 11-million acre area of leading deciduous stands or leading alder stands?

[Tr. 40] A. Well, the licenses as represented on that map, and I'm just briefly looking through this. These are the actual contracts we had with the government. Basically gave – these were the only alder licenses in the Vancouver forest region; so, therefore, we were the only company that had a right to harvest leading alder stands on Crown lands within the TSA.

Q. Are they, outside of the five licenses that you've been handed, 309 through 313, are there any other leading alder licenses in the province of British Columbia?

A. No, there are not, within the province of British Columbia.

Q. Right.

A. I'm sorry. Within the province, but certainly in the Vancouver forest region. In the interior of British Columbia, for instance, you know, there is licenses that include aspen and leading deciduous stands, but certainly on the coast for leading alder stands, we had the only licenses for leading alder stands in the Vancouver forest region on the coast of B.C.

Q. And in terms of where alder grows, there aren't any leading alder licenses anywhere else in the province other than these five?

A. No, there are not.

Q. Okay. Now, Mr. Blaney, when you take the combination [Tr. 41] of the MacMillan Bloedel alder within their tree farm licenses, and the five Coast Mountain licenses, what kind of a position does it put Weyerhaeuser in in the end of 2000 after purchasing your company in terms of the alder resource in British Columbia?

A. Well, I mean, it puts – certainly puts them in a good position. I mean, we have the only deciduous licenses. And Weyerhaeuser at that time through the M&B purchase had a lot of deciduous leading stands on their TFL in their private land, so it put them in certainly a good position within costal British Columbia; and, therefore, the province, because that's really where most of the alder was.

Q. When you say "TFL," what does that mean?

A. Tree farm license. That's an area-based tenure. MacMillan Bloedel, you know, has area-based tenures on the coast. A dominant one where a lot of the alder is is around the Powder River area and the Sunshine Coast.

Q. And as you described earlier, there are generally two types of licenses, tree farm licenses where a company is granted an area and then volume licenses that are elsewhere like the one that – the ones the Coast Mountain has?

A. That's correct.

Q. Now, would you consider the position of Weyerhaeuser with Mac-Blo, the MacMillan Bloedel acquisition and the Coast Mountain acquisition, to be in a dominant alder supply [Tr. 42] situation in the province?

A. That would be correct.

Q. And your – as part of – you mentioned early when I was restating your background and experience, included in that was mention of consulting assignments for Cascade Hardwoods and for Northwest Hardwoods. Based upon your knowledge, experience and consulting assignments, in your opinion, is it possible to develop another alder sawmill of the size of Coast Mountain in the Province of British Columbia, given the volume of alder supply that Weyerhaeuser controls?

A. The answer to that would be no. An alder mill of the size of Coast Mountain hardwoods, no.

Q. And what was the production of Coast Mountain Hardwoods in the last year when you worked there on an annual basis?

A. I can't remember exactly: 43, 44 million board feet a year.

Q. And that would be the same board feet measure used in Oregon and Washington in terms of lumber production, correct?

A. Yeah, sure. The reason I say that, Mike, is, you know, that would be good. There's scribner and there's board foot; but actual board foot production, that's correct.

Q. Now, Exhibit 308, it's in evidence. I'll just ask you a couple of quick questions about it. I'd like to display [Tr. 43] the first page of Exhibit 308, and what does this show? This is a summary page.

A. Well, if you just take a look at the very top of that exhibit, it shows that when the volumes were compiled and

they went into the inventory files for leading alder stands greater or equal to 50 percent by volume at greater or equal 200 cubic meters per hectares.

Utilization level of 17.5 centimeter top, excluding environmentally-sensitive areas. ESAs are environmentally-sensitive areas. Ownership which would be excluded, such as private TFL and everything else, low sites were excluded. So basically this is a representation of the leading alder land base greater than 50 percent by volume, greater than 200 cubic meters per hectare in those timber supply areas, and that's area.

Q. The table that I've blown up on the screen basically communicates what?

A. Well, it communicates that in the Kingcome, the Arrowsmith, the Strathcona and the Sunshine Coast, the good, medium and poor are classifications that the timber stands are growing on. And they have several different site attributes associated with them, and the overall total is the volume or the area – I'm sorry, in hectares, of those leading alder stands. So you see 18 million 514.5 – 18,514.5 hectares of leading alder stands.

[Tr. 44] Q. Okay. Then I just want to display Page 5 of Exhibit 308, and this shows what?

A. This basically shows the volumes associated on those sites as – they have the file volumes, which were the inventory file volumes that were used by the Ministry of Forests. The VDYP was another type of calculation on the same-land basis, so one showed 6 million cubic meters and the other showed 5.9 million cubic meters.

Q. And if you – so rounded, do those four licenses have a total alder inventory of 6 million cubic meters?

A. I don't quite understand your question.

What this identifies are the leading types within those timber supply areas. Our licenses had an annual allowable cut that we could harvest on within this area.

Q. Okay. But is the total volume –

A. The total available for harvest in these TSAs, with those exclusion factors on there was 6 million cubic meters; that theoretically we could apply cutting permits on and harvest, though our licenses would have to be extended for that.

Q. Okay. Do you have an estimate of what 6 million cubic meters translates into in terms of board feet?

A. We used to – for budgetary purposes, we would use 300,000 cubic meters a year to cut 42 to 44 million board feet a year, so we'd usually use a conversion – at our [Tr. 45] mill, we were getting about 230 FBM, foot board measure, for every cubic meter of log that we put through the mill excluding pulp log.

Q. So if you were to translate that, is this in excess of 700 million board feet?

A. It is, about 780 – well, 780 at a 200 FBM per cubic meter conversion factor, so it would be a little less than 230. I don't have a calculator with me.

Q. Okay. Now, these licenses have what terms?

A. These are – well, there was a variation on the term. The four licenses as shown on the past exhibit in the Sunshine Coast, the Strathcoma, the Arrowsmith and the Kingcome TSAs had a 15-year term. The one in the Fraser Valley actually had a 20-year term, but by the time we came down in 1992, I believe those licenses were issued in about '88 or something like that.

I can't remember the exact date, so that license had been running for a number of years, although very little volume had ever been harvested on it.

Q. Now, Mr. Blaney, is it true that these licenses have a language in the contract that says they are nonrenewable?

A. That is correct. The Province hasn't issued renewable licenses for a number of years.

Q. Now, do you have experience with these licenses throughout your last 30 years?

[Tr. 46] A. Yes, I do.

Q. Do you – in your experience, if Weyerhaeuser continues to operate the mill it acquired from your company, Coast Mountain Hardwoods, and stays in compliance with the terms and conditions of these five licenses, do you have an opinion about the probability that they will be able to get those licenses reissued for another 15 or 20-year term?

MR. JOHNSON: Objection, Your Honor, speculation.

THE COURT: The objection will be overruled if you know the answer or have an opinion, reasonable probability.

THE WITNESS: Reasonable probability, that they would be. The government, you know, could certainly – they would take a look at the land base that had been harvested, the land base that is not harvested and identified for a harvest, and the likelihood is they would readvertise those licenses for the simple fact that jobs are predicated upon harvesting that land base, so obviously if the continuation of harvest was not permitted on that land base, a lot of people would lose their job.

BY MR. HAGLUND:

Q. And does each license contain the requirement that the alder logs generated from annual harvest be processed in the sawmill that you used to work for there?

A. I think the actual wording is "in the Vancouver area."

Q. So there's a requirement that the logs go to a mill in [Tr. 47] the Vancouver area in order to comply with the license?

A. Yes.

Q. Now, lastly, regarding the licenses, referring to Page 2 of Exhibit 307, does this contain a valuation of those licenses in Canadian and U.S. dollars?

A. Yes. As I say, that valuation was not done by myself. It was done by a consultant that had been hired by the bank when we were trying to get some financing, so basically we provided him with the licenses, the annual allowable cuts, the remaining term, and the estimated conifer percentages, and he worked those numbers through.

So the base information used in his assumption was certainly provided by us based upon the licenses that we had with the Province, you know, at that time. The only exception to that would be the mid coast and the north coast where there are some minor alder volumes available that were not at that time, and I don't think they have been to date awarded to any licensee. There is just a potential there.

Q. Okay. Thank you. Now, I'd like to talk to some questions about your experience at Ross-Simmons. What was your – what was your task as part of the turn-around team that showed up in October of 2000?

A. Well, we had be hired, myself and Wayne Kidd and Craig Spencer, to come down and to try and help out Ross-Simmons Hardwoods, who was one of the first hardwood mills actually

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[Tr. 51] They worked with us. They wanted to see an alder market established in British Columbia, but it really meant a lot of communication and a lot of just really sharing the fact that, guys, we're having some financial difficulties

here and we need you to work with us if alder is going to be established on the coast.

So there was a lot of – a lot of humble pie comes into that, but the people were – they could see that we were genuinely trying to improve the situation in British Columbia, both for them, because they had alder on their lands and it wasn't generating any value, so they wanted to see a market established, so they worked with us.

And as a result of that, and our ability to keep to our word and to pay them as we said we would, we became very well known and really did very well from that point on.

Q. Now, as you arrived on scene in Longview, did you – were there problems with slow pay to log suppliers at Ross-Simmons?

A. Well, sure. I mean, Ross-Simmons had experienced some very hard financial times. As a result of that, you always want to pay your people first. Log suppliers can tend to be set aside and you're hoping to pay them the next week and next week, so they were very much in that sort of a deficit situation with many log suppliers; had generated a bit of history with some of the larger suppliers that they hadn't [Tr. 52] paid and they owed them monies in excess of 60 day's payment, some a lot longer than that, you know, approaching a year.

So that's certainly a handful to go and talk to those folks and try to explain to them that we're going to really try and turn this thing around and get you your money, so our work was cut out for us there.

Q. If you had adequate time and enough financial resources, could you have turned Ross-Simmons around?

A. Well, we believed we could. The forecast that we did to the bank, which was really predicated upon the knowledge that we had gained at Coast Mountain, and really we face the

same situation with coniferous in the interior of British Columbia.

I've always worked for smaller companies who really didn't have a lot of access to existing Crown land, so my job was basically to find wood that wasn't in the wood box, so to speak, and to find a utilization – to try and utilize those species and create markets that weren't there before. So based upon that, yeah, we could have done that, I believe, if things had gone well for us.

Q. How much time did you think you needed?

A. Well, it can seldom be done. I mean, just convincing the major suppliers that you need so badly that, gee, we're new boys in town here and we can turn things around.

* * *

[Tr. 56] A. As a result of the acquisition?

Q. Following the acquisition.

A. I could not tell you whether that was true or not. I can't see how that would be so as a result of the acquisition.

MR. JOHNSON: May I approach, Your Honor?

THE COURT: You may.

BY MR. JOHNSON:

Q. You mentioned TSAs, the five forest licenses you were talking about. Now, during the time you were at Coast Mountain, you could not export any of those logs into the United States?

A. No, we could not. Well, I mean, the only way we could export logs is if we could advertise them first and there was no domestic need, and then under the export rules in British Columbia, then you could put them up for export.

Q. And that is the same for private lands, too?

A. Private lands are the same, yes.

Q. Now, since Northwest Hardwoods acquired Coast Mountain, that's no longer true.

MR. HAGLUND: Objection. What's no longer true, the rules in place?

BY MR. JOHNSON:

Q. I'm sorry. When you were at Coast Mountain, if a private landowner wanted to export logs to the United [Tr. 57] States, they had to go to something called the Timber Export Advisory Committee; is that correct?

A. Well, that's right.

Q. And what does that group do?

A. Well, that group, basically, if you wanted to export logs you would make an application for log export. And the application goes before them. It's advertised. If there is any interest on a domestic need, an offer would be made, you know, for a domestic offer. And then the Advisory Committee would take a look at those offers, feel if it was a fair domestic offer, they would turn down the export of those logs.

Q. Okay. Now, while you were at Coast Mountain Hardwoods, when private land would come up for bid through that TEAC, you would bid for it?

A. Yes, we would.

Q. And that would block it from going into the United States?

A. Well, if the Export Advisory Committee decided it was a fair domestic offer, that's correct.

Q. And that's what usually happened?

A. That's what usually happened, yes.

Q. Now, since Northwest Hardwoods acquired Coast Mountain Hardwoods, Northwest Hardwoods can't do the same thing; isn't that right?

[Tr. 58] A. Well, your own people from Weyerhaeuser can tell you that a little bit better. There was some discussion about that because of the type of licenses, you know, that they had – you mean they couldn't block logs? I don't actually know how that played out after I left Coast Mountain Hardwoods.

* * *

[Tr. 62] BY MR. JOHNSON:

Q. 38, Line 16 to 21.

"What was said about the management difficulties that Ross-Simmons had experienced?

"Answer: They seemed to be lacking people with a sound knowledge base of the hardwood industry running the company."

A. I think you've answered your own question there, because the question that you gave me was people, not management.

Q. Your first impression of the Ross-Simmons Longview mill was that it was a tired mill; isn't that correct?

A. That's correct.

Q. And when you started at Ross-Simmons you were told that the head rig was not set up properly; isn't that correct?

A. It was one of the evaluations that were done by Craig Spencer and Wayne Kidd.

Q. And you were told that John Simmons was the person who had set up the head rig controls?

A. I believe that's correct.

Q. When you came to Ross-Simmons they had a reputation for not paying their bills?

A. That's correct.

Q. And Ross-Simmons had not paid its bills in quite a while; isn't that right?

[Tr. 63] A. That's correct.

Q. So many suppliers were not coming to Ross-Simmons; isn't that correct?

A. That's correct.

Q. And even if they bought a good log, they didn't have the breakdown equipment to recover maximum amount of lumber; isn't that correct?

A. That's correct.

Q. One of the factors in Ross-Simmons going out of business was the rise in natural gas prices; isn't that correct?

A. Yes.

Q. One of the reasons Ross-Simmons went out of business was the poor management before you got there; isn't that correct?

A. Well, that was over a number of years. I mean, that was certainly one of the factors.

Q. One of the factors in Ross-Simmons going out of business was the lack of investment; isn't that correct?

A. The lack of investment, meaning what?

Q. Capital investment in the mill?

A. Reinvestment. They obviously had spent capital investment in the mill; otherwise, it wouldn't have been running.

Q. When you started there in 2000, Global Ventures and you [Tr. 64] and Mr. Kidd made a business plan for 2001?

A. Correct.

Q. And you predicted that there would be a profit at the mill?

A. Correct.

Q. And actually when the mill closed its doors, your log costs were under plan?

A. That's correct.

Q. Mr. Blaney, you think competition sets the price for logs in Washington and Oregon?

A. Yes, I do.

MR. JOHNSON: I have no further questions.

THE COURT: Any further questions, Mr. Haglund?

MR. HAGLUND: Just a couple.

REDIRECT EXAMINATION

BY MR. HAGLUND:

Q. Is it an advantage to Coast Mountain when you were there relative to your 135,000 cubic meter licenses to get 40, 50-percent conifer in what you harvest?

A. Oh, most definitely. That gave us a cash flow in which we could go out and buy deciduous. And that was one of the requirements on the license, was we had to basically buy, you know, prove that we purchased alder with the revenues from the conifer.

Q. So in your experience under those licenses, were you

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[Vol. 4-B (Apr. 11, 2003)] [Testimony of Wayne Kidd]

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[Tr. 70] Q. When you arrived at – or did your investigation into taking on the assignment to turn around Ross-Simmons, what was your impression of the crew, the people there?

A. The people were very good. I was really impressed with the people at Ross-Simmons. These are the type of people you move mountains with. When I first went in there and met with them with my management team, they were genuine. You just had that feeling. The atmosphere was good.

They were a little down, the morale was a little [Tr. 71] low, but these were good people. And a lot of the people had been there for quite a few years. An example of this is there was a family that used to come in every year to celebrate their son's birthday, and they would come with a cake, the sandwiches, the juice, everything.

And I witnessed that in my time when I was there and this guy's parents were in their late '70s and early '80s. It was a family affair. They were great people. I can't say any more about them than that, they were just great.

* * *

[Tr. 76] A. Not my very first visit. It was the second visit that I was there, I got a call from Dave Bosley.

Q. What did he say?

A. He wanted to know what I was doing in Washington at the Ross-Simmons mill. And I did not answer the question too truthfully. I didn't want anybody to know where I was. I was there looking at it and so I waited, getting into any discussion exactly where I was. So I didn't say I was there and I didn't say I wasn't there.

Q. Did he – had you told anybody you were considering a consulting engagement for Ross-Simmons?

A. No, no, because at that time I wasn't even – I just nicely had finished the dealing at Coast Mountain Hardwood, and we wanted to see the mill and talk to people.

Q. So you had no idea how Mr. Bosley of Weyerhaeuser learned you were at Ross-Simmons that day?

A. Well, I had no idea for sure, but Ross-Simmons mill is right on the road to their Arlington mill, and being from British Columbia, was the place. Maybe that's where it was picked up, I don't know.

Q. Now, when you showed up to take on this turn-around project at Ross-Simmons, how would you compare the situation that you faced in Ross-Simmons in the fall of 2000 to what you faced at Coast Mountain in 1992?

A. Ross-Simmons was a jewel. I would wish that Coast [Tr. 77] Mountain would have been in that same position or condition when I first went to Coast Mountain. Coast Mountain was in very poor shape. We were under CCAA. I don't know the terminology here, but that's receivership. We didn't have any equipment that was capable of doing the hardwood. Our people were good people, but not trained in the sawing of the hardwood, so Ross-Simmons was light years then ahead of us.

Q. And at the time you showed up, was there some – was there a capital improvement project nearing completion?

A. Showed up at?

Q. Pardon me?

A. Showed up where?

Q. Was there a capital program going on that was about to be completed when you arrived in the fall of 2000?

A. As Ross-Simmons?

Q. Yes.

A. Yes. There was lumber started being put in when I arrived there.

Q. Were you able to make immediate improvements in operations?

A. Yes. With Craig Spencer, who is the manager there, yes, we were.

Q. How many days a month or every couple weeks did you spend in your role as head of this turn-around team?

* * *

[Tr. 82] boards. And a grader that's doing 85 to 90 board feet a shift doesn't have a chance to take a look at it so many times. So it kind of camouflages it so it blends in, and that's the reason you're able to hold the grade up.

A finish board is shiny like the board that is in front of you, and most of you people have painted, and when you paint, you'll get a hair that will come out of that brush and it will stick on that paint. And you'll see it forever and a day until you get rid of it, it will bother you.

But if it's on an abrasive planer, abrasive surface like this, it's there. You'll see it, but it won't bother you to the same extent, because it doesn't highlight itself so much. Am I making sense?

BY MR. HAGLUND:

Q. The jury doesn't get to back and forth.

A. Sorry.

Q. Let me turn to just a couple more questions.

During the – in '97 and again in '99, 1997 to 1999, did Weyerhaeuser make offers to buy Coast Mountain Hardwoods?

A. Yes.

Q. Do you remember how much they offered to pay?

A. If my memory serves me right, the first offer was in '97, I think it was for $15 million, and this is U.S. [Tr. 83] dollars. Later, in '99, it was 15 to 17 million, and I'm not sure of the exact number.

Q. And did Rob Taylor ever make a statement about the maximum Weyerhaeuser would ever pay for Coast Mountain?

A. Yeah. On numerous occasions Rob Taylor said to me they will not ever pay one cent over $15 million U.S. for this operation.

Q. In the spring of 2000, were there discussions with representatives of Ross-Simmons to purchase Coast Mountain Hardwoods?

A. Well, the discussion started with Global Ventures and then later Ross-Simmons were in the picture, yes.

Q. So going back to the spring of 2000, you're president and CEO of Coast Mountain Hardwoods. Do you remember what amount of – what the amount was of the proposal that Ross-Simmons made in conjunction – or made in the spring of 2000?

A. It is in the neighborhood of $26 million U.S.

Q. Was there any interest shown in pursuing further discussions with Ross-Simmons at that time by Coast Mountain?

A. Well, I got a call from Gordy Boyd asking if we were interested in selling the operation, and I said, "Yes." He come up and seen me the next day. We sat around, we talked and we threw figures around. And I explained to him at that [Tr. 84] time that I'd have to get ahold of the people from Advent and my boss to be here to finish the negotiations.

And that was Dennis Costello of Advent and Tony Haight, who was my immediate boss. And they come up and met with Gordy Boyd and his associates and Mr. and Mrs. Simmons, and John Simmons, the son.

And it looked like it was going to take some six months to put the funding together, and Advent was not prepared to wait six months, because Weyerhaeuser was interested in the operation, and they were not prepared to wait six months. They wanted to move on.

Q. Mr. Kidd, what did Weyerhaeuser buy Coast Mountain Hardwood for?

A. In the neighborhood of $26 million U.S.

Q. Do you have an opinion, Mr. Kidd, about the capacity and reputation of Rob Taylor for truth and veracity?

A. I don't know if I understand the question.

Q. Do you have an opinion about the truthfulness of Rob Taylor?

A. Well, during our dealings, there was definitely things that were said and he agreed to –

MR. SIMON: Objection, Your Honor. I think that the question should be answered either yes or no and then his opinion should be stated.

THE COURT: You're correct.

* * *

[Tr. 86] BY MR. HAGLUND:

Q. What - do you consider, based upon your experiences, Robert Taylor to be a truthful person?

A. No, he was not a truthful person at the dealings that we had.

* * *

[Tr. 87] BY MR. SIMON:

Q. Mr. Kidd, Michael Simon, attorney for Northwest Hardwoods and Weyerhaeuser.

When you went down to look at the Ross-Simmons mill before becoming involved with it, you looked at the mill and you concluded that they had not spent a lot of money in upgrading and keeping up with that operation, correct?

A. Well, when I first looked at it, I didn't know how much money they had spent on the upgrading. I would have to say my views of the operation was it was a tired operation, but I did not know how much money they'd spent on doing anything.

Q. You saw that the roll cases were jerky?

A. Yeah. I would say that the roll cases were not running smoothly, there was chunks on the belts. By saying that, I'm saying it's a tired operation, yes.

Q. You saw that the rolling stock was in very poor shape?

A. No, the rolling stock was in real good shape. They had just leased a whole bunch of equipment: Some fork lifts, a button top, and a front-end loader. No, the rolling stock was very good. I don't know where you got that information.

Q. From your deposition, sir. And we don't need to put this on the screen. I'll try to save time and just tell you [Tr. 88] that on Page 33, Line 23 – excuse me, Line 18, through 34, Line 5, you were asked this question and you gave this answer during your deposition, sir, didn't you?

"Question: Now, in your initial discussions with Ross-Simmons or Global Ventures, did anybody discuss with you, anyone, what the capital investments had been or made over the last few years?

"Answer: Yeah. We discussed that and there hadn't been much. They were in the process of putting in a tray sorter when I first looked at Ross-Simmons, and they had gone out and leased five fork lifts, button top and front-end loader. Rolling stock was in very poor shape, too."

A. That's rolling stock. The fork lifts and front-end loader, that's rolling stock.

Q. Did you give that answer to that question, sir?

A. To what question?

Q. The question that I just read.

A. You asked me about the rolling stock, and I said, "Yeah, they leased rolling stock, forklifts button tops, front-end loaders."

Q. I'm move on.

When you were at the company, the Ross-Simmons Company, you know that they put in a new tray sorter?

A. Yes.

[Tr. 89] Q. You knew that they were over budget on the tray sorter? A. Excuse me, did you say when I went there, I knew that?

Q. No, no, no, no, no. While you were there, you learned that they were over budget on the tray sorter?

A. Yeah, that's correct.

Q. To the amount of about $300,000?

A. I would say that would be in the ballpark, yes.

Q. And you knew that they financed that, that additional amount they went over, out of operating expenses, correct?

A. The extra – I don't know if I understood your question.

Q. Sure. Did the company finance this extra $300,000 by taking the money out of operating expenses, as opposed to getting another loan or something like that?

A. Part of it was on an additional loan that we got, the $750. The rest was taken out of operations, yes.

Q. All right. Now, they put in the tray sorter before you got there, right?

A. That's correct.

Q. However, you would have done other things. You would have made other improvements and given them higher priority than putting in a tray sorter; am I correct, sir?

A. Yeah. I would have, yes.

Q. As a matter of fact, when you got there, you saw that their canter was atrocious?

[Tr. 90] A. That's correct.

Q. You saw that their piling techniques on their green chain were in poor condition?

A. Their who?

Q. Their piling techniques?

A. Explain what you mean, "piling techniques."

Q. In the interest of time, I'll withdraw it and move on.

You also knew that the Ross-Simmons mill in Longview could not handle a small log properly. Am I right, sir?

A. That's – did not handle it efficiently, that's right.

Q. You knew that the canter would overfeed?

A. Yes.

Q. And that there was no control on the feed and it would throw the log through the canter?

A. Yes.

Q. And that with respect to the Cambio barker, you saw that the barker tore up the wood very badly. Am I correct?

A. Two Cambio barkers.

Q. And they tore up the wood badly?

A. Correct.

Q. And that gives you poor recovery. Am I right?

A. Yes.

Q. And it damaged the wood?

A. Oh, yeah.

[Tr. 91] Q. Now, before, as a priority, instead of putting in a tray sorter, you certainly would have optimized the board edger. Am I correct?

A. No. I would have gone with a small log thing before I had optimized the board edger.

Q. Okay. Fair enough. And certainly before putting in a tray sorter you would have optimized the board edger, right?

A. Are you asking me what I would do?

Q. Yes.

A. Yes.

Q. Now when we took a look at the saws, you saw that the saws reflected very poor maintenance. Am I right?

A. No, they didn't reflect poor maintenance. The maintenance in the saws were okay. The saws themselves were no good.

Q. I stand corrected.

Now, you knew that sales were dropping off. You were experiencing that, correct?

A. You said I knew it was or –

Q. I'm sorry. When you were at Ross-Simmons, sales were low. Am I correct?

A. When we first arrived there, the sales were pretty good, but they started to dwindle, yes.

Q. Do you recall one instance where a customer purchased a million dollars worth of timber on a 60-day term?

[Tr. 92] A. Yes.

Q. And you were then able to use that purchase order to draw down $800,000 from your bank line of credit. Am I correct?

A. That's correct.

Q. And then that customer basically cancelled the order and said they couldn't take the million dollars worth of lumber?

A. I don't know if the customer cancelled the order for sure. All I know is the customer did not pay for the lumber.

Q. And the customer did not take the lumber?

A. That's right.

Q. And because the customer didn't take the lumber, it stayed in inventory?

A. We put it back into our inventory, yes.

Q. And then you had to advise the bank that you were $800,000 overdrawn in your inventory?

A. Right.

Q. And the bank didn't like that?

A. I don't think so, no.

Q. With respect to John Simmons, you got to know him when you were down at Ross-Simmons, correct?

A. I met Mr. Simmons, yes.

Q. And you concluded that – well, what was your [Tr. 93] impression of Mr. Simmons' knowledge with respect to the operations of a sawmill?

A. Well, you know, like you said, "I knew Mr. Simmons," and would you explain what you mean by, "I knew Mr. Simmons'?

Q. Okay. When you got to know Mr. Simmons and his background, did you come to any conclusions about whether or not he knew much about the operations of a sawmill?

A. I don't think Mr. Simmons had spent a lot of time in a sawmill. I don't think he had an overabundance of knowledge. That would be my opinion, yes.

Q. Your view of the equipment that you found in the Ross-Simmons mill in Longview, would it appear to be dated 10 to 15 years before 2000, correct?

A. Yeah, that's correct.

Q. Who was Jim Wood?

A. Jim Wood is a partner in Global Ventures.

Q. And was he acting on behalf of Ross-Simmons when you were down there, working with you on Ross-Simmons?

A. He would come down and look at the financials, yeah. He was doing some work, yeah.

Q. He was part of the Ross-Simmons team from Global Ventures, correct?

A. No, not when we got there. When we got there, the team to turn around Ross-Simmons was basically Bill Blaney, Craig [Tr. 94] Spencer and myself, and we reported to Gordy Boyd and Jim Wood.

Q. Now, Mr. Wood explained to you some concerns that he had about the financial aspects of Ross-Simmons, correct?

A. I don't know.

Q. Fair enough. I'll withdraw that and ask this. Did Mr. Jim Wood tell you that some of the biggest problems Ross-Simmons was facing financially was they paid themselves big dividends?

A. Mr. Wood mentioned to me that he thought that Ross-Simmons had made a poor investment, and that they had paid themselves some dividends. But he figured the worst thing that Ross-Simmons had done was they made a poor investment in the Siletz sawmill.

Q. The mill in Toledo, Oregon?

A. I don't know where the mill is. I can't tell you where the mill is.

Q. The Joint Venture with the Siletz Tribe is what you are referring to?

A. Yes.

Q. Okay. Now, did you have discussions within the management team at Ross-Simmons about rising energy costs?

A. Yes.

Q. Did you conclude that that was one of the reasons why John Simmons should not be part of the management team?

[Vol. 5-A (Apr. 14, 2003)] [Testimony of Delores Pigsley]

* * *

[Tr. 8] met the Simmons family at a dinner, and it was just to meet and say hello and know who we were. But the actual relationship was between STEDCO and Ross-Simmons.

Q. And Mr. Rilatos would be most knowledgeable about that as executive director at the time?

A. He was the executive director at that time.

Q. Of STEDCO?

A. Yes.

Q. Now, why was the Joint Venture shut down in your opinion?

A. Well, in my opinion, it was shut down because we didn't have enough logs to run the mill. It was always a point of contention with the tribal council. We got reports from STEDCO, and it was an issue of when are we going to make money and please give us a forecast. We had regular reports from the executive director of STEDCO about the mill.

Q. Now, were either Terry Lane or Jeff Valentine members of the Siletz Tribe?

A. No.

Q. Now, after the Joint Venture was closed, the tribe has kept the property on which the mill was sited. Is that right?

A. Yes.

Q. And does the Siletz Tribe have any immediate plans to reopen the facility as a sawmill?

* * *

[Vol. 5-A (Apr. 14, 2003)] [Testimony of Leo Sheehan]

* * *

[Tr. 28] Q. And you are referring to the accounting personnel at Ross-Simmons?

A. At Ross-Simmons, yes.

Q. Now, what, sir, did you observe about the profitability of Ross-Simmons during this period of '63 through '97?

A. Well, they – when Mr. Ross and Mr. Simmons bought the mill, Mr. Ross was an experienced softwood, fir and pine. He used to own Medford Lumber Company. And Mr. Simmons had a distribution yard in LA.

So when they first bought L.R. Smith, L.R. Smith was taking the alder and was cutting it in small pieces and a lot of the sales were to the companies who remanufactured the do-it-yourself, like table legs and other things, like picture frames and things like that.

I think Mr. Jack Rose became the first general manager. We had talked and thought we should cut lumber; that the best realization would be the lumber. At that time hardwood chips were a valuable commodity for any paper plant because it gave you a sheen and you had in Longview – you had in Longview two large paper companies, the Longview Fiber Company, which was started in '23, and the largest single plant in the world at that time, and Weyerhaeuser.

And being so close, that mill being so close to those, only a little over to a mile to Longview Fiber, they had a ready market for their waste for the sawdust – I mean [Tr. 29] the bark and everything because they could use that for power that ran the plants. They didn't have a long haul. You couldn't buy hog fuel from somebody in Oregon. The freight would be so high. But you could buy chips because they used to kind of equalize.

If you lived close, you kind of still are buried in the price, but you were absorbing some freight. With the future of the chip market, and they liked the chips, they gradually kept building up and they modernized the mill. When L.R. Smith had it, I used to say it was held together by baling wire. It was a mess. And when I left in '96, they had a very modern sawmill. They had always improved it. They had tripled, quadrupled the production. It was a joy watching them grow.

Q. Specifically with respect to growth and profitability, what did you observe over that 30-plus years in terms of the profitability and net worth of Ross-Simmons?

A. Well, the net worth grew on that one exhibit where you give the history. The net worth grew. When we started in '63, the net worth was 88,000.

Q. Mr. Sheehan, let me interrupt you so the jury can follow along. Are you looking at page 4 of the stipulated facts?

A. Yes. If you look there, you can see how the company grew. If you look on the left, you can see that the volume [Tr. 30] of lumber – now, this starts in '67. It took a few years to get the mill up to par. I mean to grow and put in. Then you can see that they went along up through the '80s producing maybe 12 million feet a year and went down in the early '80s. And then it started to grow and eventually got up to 52 million feet of lumber in 12-31-95.

Q. And even higher than that in '96?

A. Yes.

Q. How about profitability?

A. Well, the profitability, it grew. It only had two loss years while I was there, and they had an excellent program with their employees. They had a bonus program with their employees. That motivated them. They not only rewarded the manager on a bonus, but the tallymen. One year, as I re-

call – it is in the exhibit which you gave me, an exhibit. I will get you the number –

THE COURT: I do think, Mr. Haglund, that all of these facts are in evidence.

MR. HAGLUND: Certainly.

THE COURT: Let's move on with the case.

MR. HAGLUND: Certainly.

BY MR. HAGLUND:

Q. So the profitability got stronger throughout this time frame?

A. Yes.

[Tr. 31] Q. Now, regardless of up or down markets?

A. Yes.

Q. Now, in 1983 do you recall that the Ross family negotiated to sell the company to Weyerhaeuser?

A. Well, it was – the Ross family and the Simmons family had an agreement to sell the company. By that time Mr. Ross had died and they – Weyerhaeuser – Northwest Hardwoods' subsidiary were to buy them. And I thought it was communicated –

MR. SIMON: Objection, Your Honor.

THE COURT: The objection will be sustained.

BY MR. HAGLUND:

Q. Do you recall what happened to stop the deal with Northwest Hardwoods?

MR. SIMON: Objection, Your Honor.

THE COURT: Objection will be sustained.

BY MR. HAGLUND:

Q. Mr. Sheehan, did John Simmons care about the sawmill?

A. Oh, yes.

Q. Was he proud of the jobs and the company's position as one of the largest employers in Longview?

A. Yes, they were. The whole family was.

Q. What was your sense of the crew? What type of crew did they have?

A. They had an excellent crew because they paid such nice

* * *

[Tr. 39] upon their historic growth rating?

A. Yes, I did.

Q. And is that growth rate approximately 8.9 percent?

A. Yes, it is.

Q. And is Exhibit 127 a listing of what the profit would have been in '96 through 2001 if you just trended the three year average of '93 through '95 forward using that percentage growth rate?

A. Yes.

MR. HAGLUND: Your Honor, I move the entry of 127.

MR. SIMON: We do object to it, Your Honor.

THE COURT: Objection will be overruled. 127 will be received.

(Exhibit 127 was received.)

BY MR. HAGLUND:

Q. Displaying and blowing up 127 on the screen, Mr. Sheehan, does this display the profitability of Ross-Simmons based upon the assumption that it could have, in the absence

of predatory behavior by Weyerhaeuser, continued its profitability on a going forward basis from '96 through 2001?

A. Yes.

MR. SIMON: Objection to the question. It is both leading and assumes facts not in evidence. And inadequate foundation.

* * *

[Tr. 51] Q. Yes.

A. This was to Ms. Mosebar (phonetic) at the U.S. Bank asked that I, and the directors asked, that I present to the bank under the loan agreement if they were going to take $600,000 out, they wanted to have the bank know it and approve it. So this was the introduction to Kay Mosebar who worked with Ms. Oliver.

Q. My specific question to you now, sir: It is correct in 1994 there was a dividend payment made to Victor and Violet Simmons in the approximate amount of $600,000?

A. Yes.

Q. Why was that payment made, sir?

A. Because, from what I learned, in my going down to the LA area and meeting, Simmons Hardwood – the Simmons estate left life income to his brother and sister. What Sid did, Sid thought he was much wealthier than he really was, and he gave money to everybody. He gave a thousand a month to these, but they never paid them.

So they hired an attorney. The attorney came in. The way that we could give them for their past thousands that they didn't receive a month was to pay a dividend from Ross-Simmons. Then the trust purchased an annuity and took care of the obligation and settled that.

Q. And that $600,000 dividend for Victor and Violet Simmons came from the Ross-Simmons Lumber Company?

* * *

[Tr. 59] will ask you: How did he go about coming up with that number?

A. I'm not a mathematician. I would have had to go to an actuary because I believe the 8.98 is a weighted average moving it forward. Mr. Rasmussen – I was told that was the figure, 8.98. But it seems reasonable because a closely held company has to make something. It isn't an exorbitant average.

Q. Now, you know from Mr. Haglund's instructions to you in terms of this calculation, you were instructed to assume that the only reason why the company did not make those profits from '96 to 2001 was based upon the alleged activities of my client, correct?

A. That is right.

Q. Did you perform any independent analysis to see whether there were other factors that could have been contributing to lower profits and even losses for Ross-Simmons in years '98, '99, 2000, 2001?

A. I was asked to do a before – what would take place based upon on the past history, what should have taken place if they used the prior earnings average.

Q. You believe you did a before and after approach in that respect?

A. Yes.

Q. In doing your before and after approach, what [Tr. 60] adjustment, if any, did you make for the existence of the Asian economic crisis that took place in late 1997?

A. I did not make any.

Q. In doing your before and after approach, what adjustment, if any, did you make for the difficulties that Ross-

Simmons experienced in selling its lumber as it was projected?

A. I did not.

Q. In doing your approach, what adjustments, if any, did you make for the fact that Ross-Simmons realized lower lumber prices –

THE COURT: I think, Mr. Simon, it is clear that he made just a mathematical calculation. So let's go on. You can argue these points that you are making. Move ahead.

MR. SIMON: I need to establish a few more things for the record.

THE COURT: You can put them on at the recess. Go to the next question.

MR. SIMON: I'm too limited in my cross-examination. I have nothing further.

THE COURT: You are wearing my patience, Mr. Simon. We will talk about this at the recess. The witness testified very clearly how he made the calculation and that he didn't do anything else. Yet you continue to ask all these questions. Any further questions of this

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* * *

[Tr. 70] and highly contributory member of the Ross-Simmons staff for over 14 years. He had been mill manager during our most profitable years. So we engineered what I considered to be a very generous three-plus-year separation package.

Now in regard to the local community, I didn't feel it was at all appropriate to refer to his termination as anything other than a retirement, particularly since he had recently suffered a heart attack.

On the other hand, conversations with Sherry Oliver, who for 20 years or so had been the U.S. Bank's account manager, showed that she was very concerned about the losses. So in that context, it was essential that we emphasize that the change was deliberate.

Q. Now, Mr. Simmons, if you had known in May of 1998 what you now know about Weyerhaeuser's activities in the log and lumber markets, would you have ever terminated Bill Nelson?

A. Absolutely not.

Q. Now, it has been stipulated in this case, fact No. 18 in the jury notebook's, that Ross-Simmons borrowed $1.5 million in 1997 to pay off your father's estate and to buy out the interest of your sons.

In addition, the records also show, and I would ask that the witness be handed Exhibit 1105, that directors' fees totaling some $209,000 were paid to Simmons family members in 1997 for back directors' fees.

[Tr. 71] If you could look at Exhibit 1105, Mr. Simmons. Of the $209,000 in back directors' fees, how much of that sum did you receive personally?

A. $74,500.

Q. And you are referring to a resolution that was actually passed in January of 1997?

A. That's correct.

Q. In the four years before 1997, and I'm referring specifically to the years 1993 through 1996, did you receive any directors' fees?

A. No, I did not.

Q. In the three years following 1997, '98, '99 and 2000, did you receive any directors' fees?

A. I received $60,000 in 1998 and $60,000 in 1999.

Q. Now, at the end of 1999, this $1.5 million promissory note that you signed to the company when the bank loaned the money for the reasons in the stipulated facts, when that note was cancelled at the end of 1999, sir, did you have the funds to repay the company?

A. No, I did not. Almost everything I owned was invested in Ross-Simmons Hardwood.

Q. Was that note cancelled on the advice of your tax advisors?

A. Yes, it was.

MR. HAGLUND: No further questions.

* * *

[Tr. 78] directors' fees paid to you and your sons in 1997, am I correct?

A. There may have been. I would have to see the numbers to confirm that.

Q. When Mr. Haglund asked you about how much personally you received from the one and a half million dollars

promissory note, you told us the answer. Your sons, in fact, received more than $800,000?

MR. HAGLUND: Objection, Your Honor. This is a matter of stipulation, fact No. 18.

THE COURT: Sustained.

MR. SIMON: Your Honor, if the Court takes a look at Stipulation 18, it is not in there. It is directly relevant to the question Mr. Haglund put to this witness. It is not in 18.

THE COURT: On your representation it is not in there, I will permit you to ask the question.

BY MR. SIMON:

Q. Did your sons receive $800,000 from that $1.5 million promissory note?

A. They received at least that amount. I think that's correct.

MR. SIMON: Nothing further.

THE COURT: Anything further?

MR. HAGLUND: No, Your Honor.

* * *

[Vol. 5-A (Apr. 14, 2003)] [Testimony of Philip Smith]

* * *

[Tr. 84] BY MR. HAGLUND:

Q. Dr. Smith, it is my understanding that you received a B.S. degree in electrical engineering from Kansas State University in 1970; that you obtained an MBA with honors from the United States University of Oregon Graduate School Business Administration in 1975; that you secured your Ph.D. in business administration with an emphasis in quantitive methods also from the U of O Graduate School Business [Tr. 85] Administration in 1981. Is that a correct statement of your educational background?

A. That's correct.

Q. Also it is my understanding that you were an assistant professor of finance at Syracuse University from 1979 to 1981 and that you served in the same capacity as an assistant professor of finance at Portland State University from 1981 to 1986. Since 1986, for six years, '86 to '92, you were a principal in the firm of Willamette Management Associates, Inc., specializing in business evaluation.

For the last ten years you have been a principal in Columbia Financial Advisors, Inc., also a firm specializing in business valuations. Is that all correct?

A. That's correct.

Q. It is further my understanding that you co-authored a chapter in – co-authored an article in The Journal of Business Valuation regarding valuation of stock options in closely held companies and that you are a contributing author to the Second Edition of the volume entitled Valuing of Business: The Analysis and Appraisal of Closely Held Companies by Shannon Pratt?

A. That's correct.

Q. You are a senior accredited appraiser in business evaluation with the American Society of Appraisers. You teach for the last nine years. You have been teaching one [Tr. 86] to three times a year three-day courses with an examination in either Chicago or Los Angeles that are put on – that are business valuation courses put on by the Business Valuation Committee of the American Society of Appraisers.

Is that correct?

A. That's correct.

Q. You have also performed a variety of other teaching assignments regarding various aspects of business and employee stock ownership owned enterprises?

A. That's correct.

Q. Now, were you retained to perform a going concern valuation of Ross-Simmons and the Joint Venture?

A. Yes, I was.

Q. I want to first ask you about your analysis for valuation of the value, going concern value of Ross-Simmons. But first, what is your understanding of the going concern value of a business in a hypothetical situation like we have in this case?

A. I think it is important to understand that what I did was a hypothetical appraisal. I'm bound by my standards to state that. As far as it being a going concern appraisal, what that basically means is that you are assuming that the company is in operation and is going to continue in operation.

Q. Were you asked to make assumptions about certain levels [Tr. 87] of assumed performance and profitability under scenarios developed by Mr. Rasmussen?

A. Yes, I was.

Q. And just so the record is clear, I would like to put on the screen what's previously been marked as Exhibit 126.

Did you utilize these three scenarios to develop your hypothetical performance of Ross-Simmons?

A. I utilized the three scenarios, yes.

Q. So let's take them one at a time. We will zoom up to get scenario A.

First off, before I turn to A, could you describe the methodology that you used to develop your going concern valuations.

A. That's a big question. Let's just focus for now on scenario A. All three of the scenarios were developed in similar manners, although there are some differences. Scenario A that is shown here is a scenario in which different – a reduction in log prices was developed by Mr. Rasmussen. The actual numbers that I used from this particular exhibit were only the reduction in log prices of $89 in 1998, $83 in 1999, and $84 in 2000.

We did our own calculation of the volume of logs that were utilized. We did not depend upon Mr. Rasmussen's volume numbers. We did our own calculation of the volume number.

[Tr. 88] Q. Did they match up with what's shown on Exhibit 126?

A. Yes, they did. And so really the only thing we utilized from this particular exhibit right here would be what column one, two, three, the dollars per thousand board feet. That's an indication of the reduction in log prices for those years for this particular scenario A. The same thing is true for scenario B and scenario C.

Q. Then what did you do?

A. We took those reduction in log prices and treated them as indicative of the reduction in cost of goods sold. In other words, how much the logs cost. We did that by taking the volume of logs that were utilized by the mill times the

reduction in the log cost. And then we reduced the expense called cost of goods sold. In other words, you have got revenue and you got this expense, cost of goods sold. We reduced that cost of goods sold by the amount equal to the volume used in a particular year times the reduction in the log price.

From that we were able to produce various income numbers. The income number that we particularly focused on was something called earnings before interest, taxes, depreciation and amortization. Now, that's a big word but really what it is, in an income statement you have revenues and then a bunch of expenses. Then you have pretax profit and then you have taxes and then you have after-tax profit.

[Tr. 89] Well, earnings before interest and taxes is just pretax earnings and then you do not include – it is pretax earnings plus the interest that is paid on the debt that the company owes.

So in a sense you are just stepping up that income statement. Instead of going all the way to the bottom to net income or pretax income, you step up one more step up by not subtracting the interest as an expense.

Now, the reason we do it that way is because what we are trying to do is value the entire company. Well, the entire company is financed by equity, the shareholders, and by any loans that they get from the bank.

So when you are trying to value the entire company, what you are trying to do is look at, well, what's the value of the returns to all of the stakeholders; namely the stockholders and the loans from the bank or the debt. That return is equal to the earnings before interest, taxes – interest and taxes.

Now, because this is a manufacturing concern that has equipment that is depreciated, another way – another level of income is this earnings before interest, taxes depreciation and amortization. The thing about depreciation and amortization

is that they aren't real costs. There are not real dollars going out the door for that expense.

So we refer to earnings before interest, taxes, [Tr. 90] depreciation and amortization as cash flow to the invested capital, or the invested capital is the debt and the equity.

Q. You used the terms earnings before interest, taxes, depreciation and amortization. Does that long phrase have an acronym that is commonly used by business valuation experts, accountants and others in this field?

A. Yes. Earnings before interest and taxes and depreciation and amortization is called EBITDA. When I talk about EBITDA, that's earnings before interest, taxes, depreciation and amortization.

Q. Now, what I would like to do is have you stick with scenario A and display what has been marked as Exhibit 129 and look at – could you describe what you have done here – first of all, did you prepare Exhibit 129, this page?

A. Yes, I did.

Q. And is this display your valuation under these various scenarios of the going concern value of Ross-Simmons as of May, 2001?

A. On a hypothetical basis.

Q. Could you explain – under scenario A, let's get to the bottom line and then I will ask you to explain it. What was the going concern value of Ross-Simmons as of May, 2001, in your opinion?

A. It is indicated there in the box, going concern value of the company, $11,587,281.

[Tr. 91] Q. Now, Dr. Smith, would you explain how it is that you reached that conclusion to the judge and jury.

A. Yes. Let's start up at the top, that first number, 30,315, the volume of logs used through the mill, actually used through the mill in the year 2000.

For purposes of comparison here, I put the original EBITDA number, the original earning before interest and taxes – I don't know about your screen but mine is rather blurry.

Q. There we go. I'm sorry. Go ahead.

A. Thank you. So the first line there is the volume of logs purchased by the mill. I misspoke. I said a moment ago volume of logs put through the mill. We don't know the volume of logs put through the mill. We only know what they purchased. Some might have been left in inventory.

In any case, that's the volume of the logs purchased, 30,315 board feet – 30 million board feet. The original EBITDA was a negative 106,294. They had a loss in 2000.

The original EBITDA margin, which is the earnings figure, EBITDA divided by revenue, was a minus .6 percent. The original log cost as a percentage of revenue was 84 percent. So those are actual numbers that occurred in the year 2000 for Ross-Simmons Hardwood.

Q. There has been some testimony about log costs being the [Tr. 92] single highest cost in a sawmill. This figure, 84 percent here, bears that out for Ross-Simmons. Is that right?

A. Yes.

Q. Go ahead.

A. So in scenario A, as we saw in the earlier exhibit for the year 2000, Mr. Rasmussen developed a log cost reduction of $84 a thousand. So the reduction in cost of goods sold, the reduction in this expense item, cost of goods sold, is simply the 84 times the log volume of 30,315,000 board feet.

So the new log cost as a percentage of revenue, after the reduction for the log cost, is approximately 69 percent, 68.9 percent. The revised EBITDA number, because this simply falls through, this is a pretax number. There is no need to deal with taxes. The revised EBITDA number is this reduction in cost of goods sold plus the original EBITDA above, of a minus 106,294, or a revised EBITDA of $2,440,188. That's after the log price reduction. That is the amount of earnings before interest, taxes, depreciation and amortization.

Q. Then what did you do?

A. Well, then just explained the next number there. The 14.4 percent is simply the EBITDA margin, the EBITDA divided by revenues. That's the percentage EBITDA.

The three-year indication you see there is, I took a three year average. After making these calculations for [Tr. 93] '99 and 1998, I took a three-year average of the revised EBITDA, and that's what the $2,574,951 is. That's the average of 2000, 1999, 1998, revised EBITDA. And since our starting point for the evaluation – now, we have a financial fundamental that we can look to the market, to the market out there, as to how companies similar to Ross-Simmons might sell given this level of EBITDA.

Q. Is it common in the business valuation arena as it relates to companies across the spectrum, including wood products companies, to evaluate their values in terms of a multiple of their EBITDA?

A. It is common to evaluate their value in terms of many different – as many different fundamentals as you can develop. In the case of Ross-Simmons and in the case of this hypothetical appraisal and given our experience in the wood products industries, we have done several valuations over the years in the wood products industry, because it is a manufacturing concern and because it has a lot of equipment that is depreciated, it is our experience and the empirical evidence

confirms this that analysts, buyers tend to look it to EBITDA because the earnings before interest, taxes, depreciation and amortization is not biased by the way people do their income taxes. It is not biased by the way they depreciate their machinery. It is above those decisions.

[Tr. 94] So it is a pretty good solid number for a manufacturing concern, not just in a wood products company, but any manufacturing concern.

Q. So proceed with the balance of how you derived or came to the conclusion, that is, the bottom line displayed on the screen here.

A. Well, the next number in that column there is 4.5. That is the multiple that we used or we took times the revised EBITDA. So if I take the 4.5 times the $2,579,951, I get the number $11,587,281. That's the product of those two numbers. That's all it is.

Now the 4.5 is a very important number. It is really the critical number in the valuation. Obviously if that was 1, a completely different result. If it was 7, a complete different result would be obtained.

So you have to analyze as well as you can the characteristics of Ross-Simmons relative to whatever evidence you can gather out in the marketplace. So we went into the marketplace. We looked at a set of companies we called guideline companies because they give us guidelines as to what the multiples might be, the appropriate multiples might be.

We went to the public marketplace first and identified eight companies that are either in the wood products business or are customers of the wood products [Tr. 95] business. We have a cabinetmaker – I think a couple of cabinetmakers in there in addition to what you consider traditional mills.

We also went to the merger and acquisition market and found really – we found three transactions, two of which gave us some satisfaction. The third one wasn't all that

good. It was a multiple that was low. But it was not a necessarily comparable transaction.

We also, as a part of our ongoing work, collect what we call generic merger and acquisition multiples. In other words, we look at merger and acquisitions all over the map. It doesn't matter what industry they are in. Many times we are unable to find good candidates, and we kind of have to fall back on this.

Then the fourth source were two different analyst reports from F.S. Van Kamper and Goldman Sachs. They are both investment bankers who participate in buying and selling businesses.

Those two sources were – one of them had – I would have to look here to be specific and exact. I'm looking at my report.

The F.S. Van Kamper had 15 transactions in the wood products industry, transactions that involved International Paper. For example, Smurfit Stone, Champion International, admittedly large companies.

[Tr. 96] The Goldman Sachs report had 13 – they had 14 transactions, of which 13 had information, also in the wood products industry. So we attempted to gather information about multiples of EBITDA that these transactions occurred at.

In other words, if the transaction occurred at, let's say, $8 million, and the EBITDA of that company, the earnings before interest, taxes, depreciation, amortization was $2 million, then the EBITDA multiple is four. So that's how those multiples are determined.

In our research, and we know this from our experience, we weren't surprised when we went to the Van Kamper or the Goldman Sach's analyst reports that the only multiple they recorded on was EBITDA. They didn't report on a multiple of revenues or earnings or anything else. They reported

on a multiple of EBITDA because that's the way people who do transactions, who do deals, who buy and sell companies, that tends to be the way they look at wood products companies in terms of EBITDA.

Q. Now, what type of range – you picked 4.5 here. Before I ask you why you picked 4.5, could you relate what kind of range you observed in the investigative work that you performed that was part of your analysis and your report?

A. Just looking at some notes that I took, so I didn't have to flip through all the time. For the public company, [Tr. 97] the range of EBITDA was 4.5 to 18.6.

For the three forest product merger and acquisition candidates we identified, the range of multiple was from 3 to 10. The generic M & A range of multiples was from the 3.5 to 7.8. From these investment bankers, the Van Kasper was 4.6 to 11.9, and the Goldman-Sachs was 6.3 to 9.7.

Q. Why, Dr. Smith, did you select 4.5 as the multiple? It sounds like it is the low end of the range as you have just related for purposes of this going concern hypothetical valuation under scenario A?

A. When we have a lot of data like this, we tend to look at what is called the median, which is the middle value. If you have seven values, the median is the middle value, the fourth value down if you put them in order.

And the median range from about 7.8 – here is one, 7.6 to 9.5. So we started there. We started about in the middle of the 7. 7.6, 7.5.

Now, I'm not being absolutely precise here because what I'm trying to do is get a sense of the market. I'm just getting a sense in this time period what did companies that were similar to Ross-Simmons, what did they sell for in the marketplace, actual empirical evidence? When I say we are looking at a median here when we are looking at all these transactions of about 7.5, 7.6, these are big [Tr. 98] compa-

nies. Ross-Simmons is a small company. We wouldn't expect Ross-Simmons to sell for the same median multiple as these companies sell. Ross-Simmons is much smaller.

Ross-Simmons has less management depth. If we have somebody, God forbid, got hit by a truck, that's a problem for a small company. Ross-Simmons doesn't have the same access to capital that these big companies have.

If you look at – if we were panned back here and looked at the EBITDA over the five years, the revised EBITDA over the five years, we see that it is somewhat variable. It goes up and down, a low point there in '96, high point there in '98. So there is some variability here for Ross-Simmons. That introduces risk.

Now, recognize that these are revised EBITDA numbers. These are EBITDA numbers that are based on the log cost reduction.

So there are a lot of factors that make Ross-Simmons more risky than the companies that make up this whole set of companies that we looked at. That's why we picked a multiple of 4.5. It is approximate 40 percent discount from the median multiple that we observed in the marketplace because Ross-Simmons is more risky. It doesn't deserve the same level of multiple.

Q. Okay. Now, did you also perform a similar analysis for scenario B?

[Tr. 99] A. Yes.

Q. What was – scenario B included different log cost reduction numbers derived from the computer model that Mr. Rasmussen developed. Is that correct?

A. Yes. Could we go back a moment, Mr. Haglund?

Q. Certainly.

A. I didn't finish going down the line. I want to finish going down the line. Go back over so we can see that right there.

Q. Okay.

A. We had gotten to 4.5. We really hadn't finished our calculation. We want to finish our calculation. We have the revised EBITDA of $2.5 million. We have the 4.5 multiple. We get a number of $11,587,281.

Now, that number is the value of the equity plus the value of the debt. It is the value of the whole company. If there wasn't any debt outstanding, the value of the equity would also be 11.6 million, round number. If there wasn't any debt outstanding. The company is worth 11.6 million bucks in scenario A.

As a shareholder, though, I have to give my due to the debt holder, to the bank. In this case, the due was 3.9 – $4 million. So the number you see there, $7.6 million, is the value of the equity, the stock. But it is not the value of the company. It is the value of [Tr. 100] 100 percent of the equity. Because the company, if there wasn't any debt outstanding, there wouldn't be any subtraction there.

Q. So if, in fact, Ross-Simmons were to sell under this scenario with this EBITDA and a buyer were to agree that 4.5 is a conservative and fair multiple of EBITDA to determine value, what that seller would pay – or what that buyer would pay is this total $11.85 million?

A. The buyer would pay the $11.58 million to the seller and buy the stock for the $11.5 million – buy the company for $11.5 million in a stock transaction. But the stockholder has to pay the $3.9 million. So the stockholder is going to get $7.6 million.

But for somebody buying this company is going to pay $11.5 million under these scenarios and assumptions, and then the stockholder is obliged, let's say, to pay the debt. It is

kind of like when you have a house. You know, if you have your house that is a $200,000 house and you have $40,000 worth of equity in it, if you go out there and sell your house, What do you sell it for? $200,000. What do you do? What you have to do, you have to pay your bank, pay the mortgage off. What do you clear? What do you get to take away from the deal? You get to take away $40,000. But the house is worth $200,000. The company is worth $11.587 million under this scenario and these assumptions.

[Tr. 101] Q. Okay. Now, let's turn to scenario B. How is this scenario different than A?

A. Well, once again, you have to pan back to see the whole thing because you have different log price changes that were part of scenario B. The log changes along the top there, 135 in '93, et cetera. We did the same kind of calculation against the volume to get the reductions of goods sold and a calculation of the revised EBITDA. And the average EBITDA for that scenario B, over three years, was $2.8 million of EBITDA.

Now, you'll notice here in scenario B there is a different multiple of EBITDA. Scenario A, we had a multiple of 4.5. Scenario B we have a multiple 5. Why do we have a multiple of 5 instead of 4.5 in scenario B and, in fact, we have it in scenario C as well?

The reason is, once again, if you pan back the growth rate, the growth of earnings, the growth of EBITDA under this scenario B is much better than the growth of EBITDA under scenario A.

I mean, this is a growing concern in this particular case. In scenario A, it was flat to even declined there a bit at the last. So investors tend to be more attracted to growth than not and will pay more for growth than not.

So the five there is using the same empirical [Tr. 102] evidence as we talked about before. The five is just a 35 per-

cent discount from this median we talked about as opposed to 40 percent discount, recognizing in scenario B and C, given the log cost reduction assumptions, we have a more growing concern here. We are willing to pay a little bit more.

So the calculations are the same here. We get down to the three-year average revised EBITDA times the five multiple. We get $14.2 million and change, you see.

Once again, we go through the same calculation that we did a moment ago to calculate the equity. What our assignment was was to evaluate the going concern value of the company. We step up to the $14.2 million in scenario B. If you move it up there, Mr. Haglund, we can see what scenario C is, $15.2 million.

Q. So the record is clear, in scenario B, the total going concern value that you calculated or that you concluded as the going concern hypothetical value of Ross-Simmons as of May, 2001, was $14,226,220?

A. That's correct.

Q. And as to scenario C, you concluded that the going concern value of the company under that scenario, this is Ross-Simmons, was $15,176,282 as of May, 2001?

A. That's correct.

Q. Now, Dr. Smith, did you also perform a going concern [Tr. 103] hypothetical valuation for the Ross-Simmons/Siletz Tribe Joint Venture sawmill as of August, 1998, when it went out of business?

A. Yes, I did.

Q. And if I could display what's been marked as Exhibit 130. We will display it here. And then if you will tell me what you want – how you want me to zoom in.

A. Yeah. This is a little bit difficult for people to see. But what we have here is an income statement for STEDCO.

STEDCO is the Joint Venture. We have – starting over on the left-hand side, we have calculated the latest 12 months as of the close of business, August 31, 1998. In other words, that left most column there is the revenue and expenses and earnings of the Joint Venture as of August 31, 1998.

Now, we did not use that particular set of numbers here. We did not use that performance that existed at that time because, once again, we were doing a hypothetical appraisal. We wanted to see what the company's value would be under a set of assumptions that we were provided with.

So what we did, we stepped back to the end of '97, December 31, 1997. We were told that was a more normal operating year from which to make our – from which to incorporate the assumptions. And so if we move it over just a little bit further there, Mr. Haglund, a little bit [Tr. 104] further, a little bit further. Right there, please.

Let's ignore those first three columns labeled 12 months, 8 months, 8 months with August 31st and let's concentrate on these four columns. As a matter of fact, what I want you to concentrate on are the three columns there, without the last column, December of 1996.

We were told that the joint venture operated on a one-shift basis in 1996 and 1997 and, in fact, 1998. We were also told and informed by Mr. Nelson that if the company could have obtained logs, the plan was to go to a two-shift operation. So we needed to adjust this income statement from a one shift operation to a two-shift operation under the assumptions for our hypothetical appraisal.

We were provided information by Mr. Nelson about log costs, about manufacturing costs, and about labor costs necessary to operate two shifts as opposed to one.

So what we did is, we – and our results are there in that pro forma, 12-9 – I apologize. That should say 12-97, the pro forma column there. What we did, we doubled the reve-

nues and then we incorporated the manufacturing cost information, the log cost information and the labor cost information provided by Mr. Nelson into the calculation of earnings for the company and calculated an EBITDA, earnings before interest, taxes, depreciation and amortization, for [Tr. 105] what we call a pro forma income statement assuming that STEDCO operated on two shifts and that the information provided by Mr. Nelson was information that was important to determining what the earnings of the company was because there was an additional log cost, labor cost, and manufacturing cost.

Q. And you assumed that the information provided by Mr. Nelson was accurate?

A. I had to. I had no way to confirm it.

Q. And which number in this column is the EBITDA number that you derived under this two-shift scenario with the information provided by the then manager of the Joint Venture, Bill Nelson?

A. It is the next to the last number, $984,230.

Q. Now, then what did you do from there?

A. Well, then we performed a similar calculation in terms of we took that EBITDA times an appropriate multiple. It is down there to the right. There you go. Times an appropriate EBITDA multiple. Once again, we are using the same empirical evidence that we talked about before. Except now we have a company that is really in worse shape than Ross-Simmons was in that scenario A that we talked about before.

We don't have very much information here in order to determine risk. We just know that this company – we [Tr. 106] only have one year where we made this adjustment. For conservatism purposes, I didn't feel good about using 4.5 here. I thought 4 was a reflection of – this company kind of struggled from what I was told virtually from the beginning. So it is a more risky situation. We used the 4 multiple to take

into consideration – all these transactions that we saw in here had a median or middle multiple of 7.6.

So we took that four times the EBITDA. We get the market value of invested capital, or the value of the company, of $3.9 million. However, they are operating a second shift now. The working capital necessary to operate a second shift is greater than the working capital that was necessary to operate only one shift. In fact, we almost doubled the working capital. We had to subtract that out, the 450,000, to get our final indicated going concern value of the $3,486,918.

Could I say something here? I don't want you to think that we can come to these kinds of numbers that exact. That's why when I'm talking about it, I talk in terms – it is about $3.5 million. To put up $918, the reason it is like this, I didn't want any questions about the mathematics, but the value is $3.4, $3.5 million. The $918, that's just mathematics.

Q. So just so I have got a good, clear, clean record here, [Tr. 107] Dr. Smith, based upon the log cost reduction and information and the cost and other data associated with an assumed two-shift operation at the Joint Venture in Toledo, it is your opinion as of August of '98, when the company went out of business, or the Joint Venture went out of business, that the value – the going concern value of that business under this type of hypothetical scenario is the $3.48 million?

A. That's correct.

Q. Now, why did you not – I think you have explained it, but let me also ask it with respect to Ross-Simmons. For the Joint Venture, you made a deduction for a working capital investment associated with the second shift. We saw no such reduction in your Ross-Simmons three scenarios. Why not?

A. Ross-Simmons had operated with low or negative working capital balances for several years. They, in fact, had a negative working capital balance as of valuation date.

My reason for deducting this $450,000 was simply a recognition, not that STEDCO had too little working capital; it was a recognition that we were dramatically changing the operation of the company. With Ross-Simmons, all we did was reduce log cost. Same number of hours were worked. Everything was the same.

With this, we actually changed the operation. For our hypothetical appraisal, we changed our operation to two [Tr. 108] shifts. You are naturally going to require additional working capital because you have a two-shift operation that changed it that much. That's why it was subtracted here and not subtracted in the Ross-Simmons.

Q. Ross-Simmons had been operating profitably for over 25 years with levels of working capital close to the 1.0 area?

A. Well, certainly they operated at low levels of working capital. That's all I'm willing to say.

Q. Okay. Now, Dr. Smith, what does the term "debt to total capital ratio" mean?

A. Well, debt to total capital is an attempt in a very simple ratio to reflect the degree of leverage, the degree of debt that a company has relative to the total capital. That is financing the operation and the total capital that is financing the operation is debt and equity. That's where the money comes from to operate the place.

So the debt to total capital ratio is a ratio – and there are many, many different ways to calculate debt to capital ratio and there are many, many different leverage ratios. Debt to total capital happens to be one of them.

If you have a lot of debt relative to total capital, in other words, if your debt to total capital rate was 75 percent, what that says is if you had a million dollars worth of capital, $750,000 was coming from the bank, $250,000 was coming from the equity holder, so your debt to [Tr. 109] total capital

ratio 7.5, you could figure it out for yourself. That's a risky position – excuse me – that's a riskier position.

Q. Now, Dr. Smith, is it a fair statement that during your career as a business valuation appraiser that you have performed a great number of valuations that were engagements for wood products companies in the Pacific Northwest?

A. I was very fortunate when I started out to go to work for a company that valued wood products companies. Obviously our location up here in the Pacific Northwest, you have a lot of wood products companies. We don't actually count how many we did or do, but I certainly am involved in 10 or so, maybe 12 appraisals a year of wood products companies.

Q. In your career, is it a fair statement that you have done in excess of 200 wood products company valuations?

A. Yes. I want to be very specific. That's not 200 companies. That's 200 engagements involving wood products companies.

Q. Some companies for multiple reasons will come back to your firm year after year to do a valuation of the company?

A. Yes, sir.

Q. Now, regarding this term that you discussed a few minutes ago, debt to total capital ratio, my question, Dr. Smith, is: Is that term one of the commonly used means [Tr. 110] of looking at the leverage of companies, big, small, private and public?

A. I could just say that it is a means of looking at the leverage of any company.

Q. And in connection with preparing to testify here, have you calculated the debt to total capital ratio both for Weyerhaeuser and for Ross-Simmons in the years 1996 and 1997?

A. Yes.

Q. And in 1996 what was the debt to total capital ratio for Weyerhaeuser?

A. Once again, we had to understand that the debt to total capital can be calculated in a number of different ways.

You can have all of the debt. You can have the long-term debt. If you incorporate all of the debt, I believe that's the way in this calculation that I did it. In 1996, Weyerhaeuser was 44.4 percent debt to total capital ratio.

Q. And what was Ross-Simmons?

A. 37.6.

Q. So Ross-Simmons actually had a lower level of leverage in 1996 compared to Weyerhaeuser?

A. Relatively speaking.

Q. What was Weyerhaeuser's debt to total capital ratio in 1997?

A. 40.8 percent, according to my calculations.

[Tr. 111] Q. In 1997, I want to – well, for 1997, for Ross-Simmons, did you calculate debt to total capital after discounting or ignoring the $1.5 million note from John Simmons?

A. Yes.

Q. So you take that off the balance sheet, it is going to increase the total debt to capital ratio. Is that right?

A. Yes. Because you won't have that asset there any more.

Q. Having taken that off, the 1.5 off the Ross-Simmons balance sheet, what does the total debt to total capital for Ross-Simmons work out to for 1997?

A. 43 percent.

MR. HAGLUND: That's all I have, Your Honor.

THE COURT: Cross-examination.

MR. SIMON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SIMON:

Q. Good morning, Dr. Smith. Michael Simon.

A. Good morning.

Q. This was a hypothetical appraisal you have done here. Is that correct?

A. That's correct.

Q. How many others, not counting this one, how many other hypothetical appraisals have you done, sir?

A. This is my first one.

Q. You have done more than 200 wood products company

* * *

[Tr. 117] Q. I will move on now to the other area. I want to close this area with this question. I take it you were not supplied with any information that would explain why they were unable to sell the one shift of lumber, am I correct?

A. That's correct.

Q. Okay. I will move on.

With respect to the Ross-Simmons valuations, the scenarios A, B and C, those were all dependent upon the log cost assumptions made by Mark Rasmussen?

A. That's correct.

Q. I won't belabor this point, but I want to make sure I understand you. Just like your STEDCO valuation was a hypothetical assumption, so were your valuations on Ross-Simmons' value?

A. That's correct.

Q. You made no independent effort to verify or evaluate the reasonableness of any of those assumptions. Am I correct?

A. That's correct.

Q. When you first prepared your expert witness disclosure in this matter, the valuations that you gave, the going concern valuations, were several million dollars less than the going concern valuations that you have just testified to today. Is that correct?

A. That's correct.

* * *

[Vol. 5-B (Apr. 14, 2003)] [Testimony of Jerry Martin]

* * *

[Tr. 11] MR. SIMON: Thank you, Your Honor.

Your Honor, for defendant's first witness, we call Mr. Jerry Martin.

THE CLERK: Would you raise your right hand and be sworn, please.

JERRY MARTIN

Was called as a witness on behalf of the Defendant, was duly sworn and was examined and testified as follows:

THE CLERK: Be seated.

Would you state your full name and spell your last name for the record, please.

THE WITNESS: Jerry Martin, M-a-r-t-i-n.

DIRECT EXAMINATION

BY MR. SIMON:

Q. Good afternoon, Mr. Martin. I understand that you have been employed by Northwest Hardwoods since 1974, almost 30 years; that you have had almost every position one can have in a hardwood sawmill, including quality control for more than four years.

And from 1984 to 1996, you were the mill manager at Northwest Hardwoods mill in Centralia, and you are currently Vice President of Western Operations at Northwest Hardwoods. Do I have that correct, sir?

A. Yes.

Q. Thank you. I noticed that as you walked up here [Tr. 12] there's a little bit of a limp. Would you tell us very briefly about the back surgery you recently had.

A. Yes. I had two ruptured disks and a bulging disk in my back, and I'm just starting through therapy, and had both those operated on. And that's been first part of February.

Q. And I understand that sometimes it gets a little uncomfortable to sit for a long period of time?

A. Yes.

Q. If you are in pain about that, just please tell the Court.

Mr.Martin, I understand that Northwest Hardwoods purchased Diamond Lumber's hardwood sawmills in Eugene and Garibaldi, Oregon, in 1995; is that right?

A. Yes.

Q. Now, after that purchase was made, did you personally, sir, play any role in reviewing and then supervising the changes made at the Eugene mills regarding sawmilling optimization and value recovery?

A. Yes, I did.

Q. What was your role?

A. I was the project team leader or facilitator for Eugene, Garibaldi and Coos Bay.

Q. By the way, that phrase I used is a mouthful. What is sawmilling optimization and value recovery, in general terms?

[Tr. 13] A. In general terms, sawmilling optimization can mean a little different thing for each breakdown center, but it's technology that aligns the resource with the breakdown center.

Q. By 'breakdown,' I assume you mean cutting the logs?

A. That's correct.

Q. Okay. Now, with these mill improvements that you supervised, can you tell us generally what are the reasons or

purposes why Northwest Hardwoods makes these types of improvements?

A. Yes. We looked at three different opportunities there. We looked from a people standpoint or safety, environmental and training of our employees, and to improve and review the recovery and the yield at the particular mill.

Q. First of all, let's talk about recovery then. What do you mean by "recovery"?

A. Recovery means how much you get out of a log.

Q. How much what?

A. How much lumber you get out of a log, excuse me.

Q. What do you mean by "yield"?

A. Yield is what value you get out of a log.

Q. Now, how long did it take to make these improvements at the Eugene mill?

A. It's ongoing. We continue to improve and have been continuing to improve since we've acquired those facilities.

* * *

[Tr. 18] From that, they'll all flow down, each one of these will flow down to our main gang. And our main gang is basically just a box with saws in it, approximately 30 saws. We have an operator here that is making a grade decision process from a value uplift determining where each one of these blocks will go.

From the main gang, there's an opportunity to view that block; and if, in fact, there is a lot of sweep which alder certainly does have, we can send it over to our sash gang. And if I might be able to draw, just real quick.

Q. There are some markers for you here and there's some butcher paper.

A. I want to take just one second here to talk about the high – excuse me, the sash gang. Normally, if you have a straight type block or cant, we'll go through that to show you what that is in a moment, that will go though our main gang.

If, in fact, that block has a lot of sweep in it, which alder, being such as it is, there are quite a few of those, it will actually saw – this machine will actually saw on an arc, and it will actually saw that board like this (indicating) so recovery is paramount.

It's an opportunity to gain the full length and get longer boards versus shorter ones. Higher recovery, again, higher recovery. If that went through the main gang, [Tr. 19] however, you will see what would happen. If it's going in this way, you'd create a lot of short boards and a lot of product that's going to go into waste, into a chipper.

Okay. So we go up to the main gang. All these boards that need to be edged will come on over to an optimized board edger, over to this part here, and we'll talk about that again. Also, there's a person that is dealing these boards to optimized value and recovery.

From there it flows on down to our trim saws, out to our lumber stacker, has to be stacked and stickered automatically. We have an automatic sticker there with two people, in fact, recognizing the placement of those sticks and where they are going to go, from the dry kiln on out to the abrasive sander.

Now, I want to take it back one step here and we're going to follow from the main gang on out is our smaller cant-type pallet lumber, we'll be able see that in a moment, which flows on out to the pallet chop saw, and, again, we're chopping first before we go into our pallet gang.

Pallet gang is the same thing as a main gang here, just a box with saws in it, thin saws, and we'll get back to that. Then on out to the pallet stacker. This flow here is all green.

Q. What do I mean by "green"?

* * *

[Tr. 25] Q. Mr. Martin, what's pallet?

A. Pallet, as we talked about before, in our lineup as it goes through our main gang, going back through the pallet stack or the pallet gang, on out to the pallet stacker. If you went into Costco or Home Depot or into Lowe's, you would see material stacked on pallets. It's those boards or lumber that's made into a pallet that you see all around. Okay. And that's a sold out green. We don't make the pallets, we make the lumber for the pallets.

Q. Please continue.

A. Uh-huh. As opposed – as in Example B, which would be a higher value, higher grade cant, he or she would, in fact, then place that through all four-quarter, because we have determined that this portion is still of a higher value than a pallet.

Q. Okay. Are you done with this chart?

A. Yes.

Q. Now, you mentioned, when you took us through the Eugene mill flow, the high-yield mill. Using our next chart, take us through, what is this concept of a high-yield mill?

A. We start with, what I talked about earlier was an underutilized part of the resource, and that being the smaller size of the resource. If you were to put that through the standard configuration of a larger mill, the opportunities for value and the balance between value and [Tr. 26] volume would not be in harmony.

So what we do is on a four-inch small end diameter log, if this depicts a 40-foot log, five inches on the small end and four inches on the small end of this one, normally, I would say a lot of times people put this straight into a chipper or make pallet out of the whole thing.

What we will do is we will come back and segment this again cutting into blocks and take the seven inch, six, seven and eight-inch up blocks, ten-foot segment, into a specialized mill, low volume, highly-specialized mill that has a high degree of value. It's a value added part of our facility. And this depicts that harmony that you have to have between value and volume.

Q. Thank you. Our next chart is labeled saw kerf comparison. What is a saw kerf? What is a kerf?

A. Kerf is basically the tooth that is taking the bite out of the log. If you just think about it in thickness of saw, just thickness of saw. And if we go back to this one when I talked about – to remember the amount of saws, there could be up to 30 of these saws in here.

Each one of these lines is a saw. Extremely important because if, for dramatic sake, if you had a quarter-inch kerf in every one of those lines, as opposed to an eighth of an inch kerf, the recovery factor would go way down. You're making a lot of sawdust.

* * *

[Tr. 28] Q. It's right there.

A. Again, the thickness of the saw is the key. Okay?

Q. Mr. Martin, you mentioned that it takes additional training and skilled employees to operate thinner saws than thicker saws. Why is that?

A. The way that the saws are worked within this box, the thinner the saw you have, the larger opportunity for sawing deviation to hold target sizes, if you will, and we'll talk about target sizes in a moment, but that is extremely critical, to be able to maintain those target sizes. If you can't, you have to cut your lumber thicker just to make up for the inopportunity that you have with those thick saws.

Q. I think our next chart relates to lumber thickness. Are we ready to go there?

A. Yes. Again, these are actual – actual dollars, actual sizes. Could not hold tolerances, could not hold the target sizes that the Northwest Hardwoods' standards are. In four-quarter lumber alone, they were cutting one and a quarter, just to give you an example, and we are at 1.50.

As you look down through here, if you look at the savings just from a target – target sizing of the lumber, this is the size of the lumber now, annually is around $585,000 savings. To be able to perform that, train the people, be able to tie it together, get a recovery form, annually is $585,000. Those are actual numbers.

[Tr. 29] Q. Thank you. Now, for the next series of questions, if I can ask you to take back the witness chair and then we'll get you back down here a little bit later.

A. (The witness complies.)

Is it all right if I have some water?

THE COURT: You bet.

THE WITNESS: Thank you.

BY MR. SIMON:

Q. Mr. Martin, continuing with the exhibit that you prepared – if we can go to the next slide, please. There you go.

We have some photographs from the Eugene mill.

A. Yes.

Q. I'd like to take you through those photographs one at a time and basically ask you what they depict. So the first one is?

A. The first one shows the Eugene facility circa 1995.

Q. Go to the next photograph, please. Narrate us through, please. What are we looking at now? What does it show us?

A. Here, we're showing a log yard with a closed loop watering system. From an EPA standpoint, clear water, being able to use the same water in the makeup water to facilitate our log yard, extend our inventory shelf life and extract a higher value throughout the year.

THE COURT: Mr. Simon, let me ask you a question. [Tr. 30] These are in evidence. I don't think there's any dispute about the quality or efficiency of Weyerhaeuser's facilities, is there?

MR. KELLEY: No, there's not, Your Honor.

THE COURT: So let's move quickly to the issues involved in this case.

MR. SIMON: I will move quickly, yes, sir.

BY MR. SIMON:

Q. One of the issues in this case, Mr. Martin, deals with pavings of a log yard – a log yard that's paved or not paved. There is evidence in this case that the Ross-Simmons and STEDCO log yards were not paved, but gravel log yards.

Is the Northwest Hardwoods log yard in Eugene paved; and, if so, what difference does it make?

A. Yes, it is paved and it makes a lot of difference in these regards. The shelf life and the opportunity to keep your highly valued and extract the highest value out of the logs, keep them out of the mud, out of the grit, out of the rocks.

You cannot have a thin kerf sawing program, obviously, the thinner you have as the saws get thinner, you have a have a clean log. That is a big part of a thin kerf program, to be able to extract the maximum value out of that particular log.

Q. I am going to move quickly through the next few slides [Tr. 31] and then spend a little of time on the head rig. Our next slide, please.

A. Again, the barker area. You can see one before and after, and, again, that barker is taking off the bark, reduces our down time and increased value.

Q. Next slide, please.

A. It's a block deck to show that we are taking these blocks off the smaller diameter logs and improving the utilization and increased mill flow.

Q. Next slide, please.

A. Here we're seeing and depicting the old cutoff saw, bar-type style, as opposed to a newer 72-inch cutoff saw for improved recovery and less waste.

Q. Next slide, please. And we'll spend some time here on the head rig.

A. Yes. This is the head rig. And it shows the old head rig versus the new one. And we talked about saw kerfs and how important that is. We saw close to $600,000 improvement that we've had on target sizing at the head rig. And also installed our stereo scanning set work system.

Q. That is what I'd like to spend a little bit of time on, Mr. Martin, because there's been testimony in this trial that Ross-Simmons did not have a stereo scanning system, they had a curtain scanning system. Will you take us through the difference: What does it mean?

[Tr. 32] A. Basically, an optimized stereo scanning system is a three dimensional. It's showing about 180 degrees of log for what we call the best opening face. The repeatability of that versus the light curtain scanning, or, in fact, no scanning at all, is much improved. It's the next generation, if you will, and the improved opportunities there that you have

in the form of recovery, better grade utilization that leads to higher returns.

Q. Next slide, please.

Now, the high-yield mill you've already described for us, so I won't spend any more time here.

A. Okay.

Q. Next slide, please.

The main gang, you already described that for us. What's a horizontal resaw?

A. What we're doing there is on that portion of the block that we saw that I talked about had a number of defects, juvenile defects, if you will, on the interior of the log. When you take that pallet cant out of there, and what we'll do is, in fact, have a trained operator again review all four sides of that pallet cant, and if there's any clear lumber, any lumber at all, we will, in fact, extract that value off the side of that. And that's what this machine here will do.

Q. Go to the next slide. I do want to spend some time on [Tr. 33] the board edger, and then the next slide after that, I want to spend some time on edger optimization.

First of all, would you explain to us what is a board edger, and if you need to, if it will be helpful to you, we do have these samples you put together of 1458C, again, provided and disclosed on April 1, 2003. Will this be helpful at this time?

A. Yes.

Q. I'll ask the question, what is a board edger and how does it work?

A. Yes. If we were to envision this as an 8 or 10-foot board, 8 or 10-foot board, if you have a – this would depict an edger that is losing opportunity. We have nice square edges and this wane, or lack of wood is what wane is, you

can see here we have about a quarter of an inch of clear wood opportunity. On this side we have relatively about the same.

One-eighth of an inch misedged in out – in anybody's edger, one-eighth of an inch would show and equate to around $700,000 lost opportunity. Just to show you how just a small thing like that, if, in fact, we set the saws and we ended up with this board, as we depict here, an eighth of an inch on either side lost into the chipper, would equate right at $700,000. So this would be a misedged board.

[Tr. 34] f we just set the saws in clear wood and not just left clear wood, if you have a quarter of an inch saw kerf, and, again, we talked about the thickness of the saw, and we set just that into the clear wood, again, $700,000 loss annual opportunity.

Q. At any given mill?

A. At a mill that was one of our mills, depends on how many boards you're putting through that machine, yes.

Q. Thank you, Mr. Martin.

The next slide focuses a little bit more on edger optimization. Did you put in an edger optimizer in Eugene?

A. Yes, we did. And I might add, if I might talk a little about that, this fellow, when we took over, was down in a hole, and was just – and I can relate to this because I've done this job – just buried with lumber.

And to be able to – and he's still there and he works with this machine now, and he just deals the boards into this optimization that is scanned, the lumber is scanned. And depending on the scanning, the program we have in there, and depending on the grade of the board, will determine on where they edge the lumber.

Q. Mr. Martin, and I'm not going to show the videotape, Plaintiffs' Exhibit 1, but I will ask you: Before trial, did you review the videotape of Plaintiffs' Exhibit 1?

A. Yes.

[Tr. 35] Q. Did you see anything that looked to you as if it was ineffective edger sawing? What did you see on that?

A. Yes. It showed strips coming off of the edger and it appeared to be easily all clear wood, and we know that just an eighth of an inch is close to $700,000 a saw, that's just an estimate, I would say around a quarter –

MR. KELLEY: Your Honor, at this stage, I am going to object. He is giving expert testimony and he was never designated as an expert.

THE COURT: Yes, I will sustain the objection. The amounts that he's talking about are opinions as to expert testimony. The objection will be sustained and the previous testimony of the witness about the amounts of money saved is stricken and you're instructed to disregard it.

You may proceed.

MR. SIMON: Your Honor, I was intending to ask that as a fact question, not an opinion question. I think the evidence is fact testimony, not opinion testimony.

THE COURT: I haven't seen any figures and it's not in his statement. I looked to see if there were any estimates of any figures given in his statement and I didn't find any.

MR. SIMON: I'll move on, Your Honor.

THE COURT: All right.

[Tr. 36] BY MR. SIMON:

Q. With respect to the trim saws, let's cover these briefly, and then spend a little more time when you get to the boiler and the silo. What do we see here?

A. The older antiquated trim saws that had issues from a value recovery, the new one is at the bottom, and a safety and ergonomic standpoint.

Q. Okay. Next slide, please.

Briefly, what do we see here?

A. Manually-pulled lumber versus a lumbér stacker, automatic stacking.

Q. Okay. Next slide, please.

Tell us with about the boiler and the silo and the relationship between what you do with the sander dust and how that affects your energy costs?

A. The boiler and the package that you would put on there basically is a suspension burner. And you are blowing the sander dust into this big boiler, and that, in fact, creates the steam for the dry kilns, these big ovens, and we're about 90 percent effective with that versus natural gas, with the ever-rising cost of natural gas.

Q. I take it that the picture on the bottom is the kiln and that's used to store what – not the kiln, the silo?

A. Yes. That shows the building of the silo where the dust is being stored.

[Tr. 37] Q. Go to the next slide, please.

Kilns, we've talked about.

Go to the next slide.

More kilns.

Let's go to the next side, please.

You talked about the abrasive planer.

Let's go to the next slide.

Log yard. Now, this is not Eugene, this is at Garibaldi; is that correct?

A. Yes, this is at Garibaldi.

Q. What do we see here?

A. This shows the five-and-a-half acre project as far as paving our log yard.

Q. Go to the next slide, please.

Please, continue.

A. Yes.

Q. Now, what does this show us?

A. This shows a recovery. We talked about recovery and what that is. That's how much you get out of the log and over the years and with improvements and with some of the things we've been able to do at our Eugene facility from acquisition to where it is today, basically a straight line of improvement.

Q. Let's go to the next slide, please.

And now do we have similar with Garibaldi?

[Tr. 38] A. Yes, this is Garibaldi, recovery history, similar results.

Q. All right. Thank you. That ends this particular exhibit.

Let's move on to another area, Mr. Martin. Did you have a meeting with the Board of Directors of Ross-Simmons sometime in the early 1990s?

A. Yes, I did.

Q. Where did you meet with them?

A. I met with them at a restaurant for a casual dinner. The Tyee is the name of the restaurant in Olympia, Washington?

Q. Who did you meet with?

A. Present was John Simmons, Marie Simmons, David Simmons and myself.

Q. How did that meeting come about?

A. There was an inquiry if I would like to visit with them about an opportunity as a general manager of Ross-Simmons.

Q. Tell us about that conversation, that dinner conversation, that you had with the Board of Directors at Ross-Simmons that evening?

A. It was a casual meeting, just a dinner meeting, and we talked about sawmilling concepts and general ideas.

Q. And did they make you an offer or present you with an opportunity?

* * *

[Tr. 41] THE COURT: We're not going to argue about the efficiency or the quality of Weyerhaeuser's facilities now, are we?

MR. KELLEY: No, Your Honor, I'm not.

THE COURT: All right. Let's get on with that.

CROSS-EXAMINATION

BY MR. KELLEY:

Q. Mr. Martin, your title right now, is Director of Western Operations. Is that what you said earlier?

A. Vice President of Western Operations, yes.

Q. And how long have you held that title?

A. May or June of '97, I believe.

Q. And there's been no change in the name of that title since '97?

A. No.

Q. Do you recall being deposed in this case back on June 11th, 2002?

A. Yes.

Q. Do you recall at that time saying your title was Vice President of Alder Operations?

A. I might have.

THE COURT: I am going to raise this objection. I don't let lawyers generally summarize what's been said in a deposition. I like to hear the questions and answers that have been used here before, so there's no misunderstanding.

* * *

[Tr. 47] Q. And are these all state-of-the-art mills now?

A. It is never ending.

Q. Garibaldi, I notice that you only showed one slide on that. Does the Garibaldi facility have a dry kiln?

A. No, it's a green facility.

Q. Okay. And does it have this abrasive planer that we've heard so much about?

A. Being a green facility, no, it would not.

Q. So am I correct then that all of the lumber produced at Garibaldi would be trucked to where, the Eugene facility?

A. Yes.

Q. The there it would have to be dried and then planed and graded; am I correct?

A. That's correct.

Q. You have driven around this entire area, have you not, sir, to the various mills in the area?

A. Yes.

Q. Do you know where Toledo is?

A. Approximately.

Q. Do you know where Ridgefield is?

A. Ridgefield, I do, yes.

Q. Okay. Would you agree with me that the approximate travel distance between Toledo and Ridgefield and from Garibaldi to Eugene are comparable?

A. I couldn't comment on that.

[Tr. 48] Q. Now, you talked about a meeting that you had with members of the Simmons family. Do you recall when that was specifically?

A. No, not specifically. I know late '80s, early '90s, could be '92 or '93, right in there.

Q. You didn't perform a lot of due diligence in terms of what you were –

A. No.

Q. You didn't even go into the mill and look at the equipment; is that correct?

A. That is correct.

Q. Talk to any of the crew?

A. No.

Q. Look at financials?

A. No.

Q. The meeting with senior management that you just told Mr. Simon that you'd been attending since mid-1997, just a few questions for you, sir.

MR. KELLEY: If I could have the witness be handed Exhibits 400 through 405.

THE COURT: You may.

BY MR. KELLEY:

Q. Mr. Martin, can you see Exhibit 400 on the screen?

A. Yes.

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* * *

[Tr. 54] of our quality control people at one of the mills to learn about the quality control process, which we think is very, very important to understand our products.

Q. You mentioned some travel. What type of travel do you do?

A. I have traveled probably on an average of one to two weeks a month for I don't know how many years. My travel includes international travel to Asia. I traveled to Latin America. I traveled to Europe, within the United States and Canada. Basically, I travel to see new markets and visit with customers.

Q. Mr. Bosley, as a salesperson at Northwest Hardwoods, how would you define the overall sales philosophy at Northwest Hardwoods?

A. Our sales philosophy at Northwest Hardwoods is what I would call a value sales philosophy. We try to understand what our customers need and we try to match our products with that need. That requires, as I mentioned earlier, an incredible amount of understanding of the customer's manufacturing processes and how that relates toward our products.

Q. Mr. Bosley, we've heard some testimony in this trial about proprietary grading systems for lumber. From the perspective of Northwest Hardwoods, what is proprietary grading?

[Tr. 55] A. Proprietary grading, in a nutshell, is providing a product that meets a customer's needs. Sounds real simple, but by providing a product that meets a customer's needs, that improves the customer's yields, that makes the customer more profitable, and we want profitable customers.

Q. And Mr. Moody is putting up on the screen one of the grades, this from Exhibit 1461. What is this exhibit?

A. This exhibit is one of our proprietary products. It's a superior grade. This happens to be alder, but we have a superior grade in Wisconsin mills as well, and the Wisconsin mills are producing red oak, white oak, cherry, and a variety of other hardwoods. The superior grade, I would have to say is our top of the line product.

Q. What types of applications is superior used in?

A. Superior would be used for any application where the customer needs long cuttings, long, clear, two-face cuttings. A door maker may want to use superiors. A cabinet maker and molding maker – now, alder does not lend itself real well to molding, but there are moldings made out of alder.

So in any case, it also would lend itself to a customer who doesn't have – maybe a smaller customer who doesn't have a lot of options for its products, so maybe a small cabinet shop would want to use superiors.

Q. Now, relative to the other grades that Northwest [Tr. 56] Hardwoods offers, what is the relative expense level of the superior?

A. Well, we talk about everything in terms of FOB mill prices, prices at our mill. This is on a net tally. This is the actual footage within that unit on a four-quarter basis. We're talking, I believe, in the low 1600s right now.

Q. That is $1600 per thousand?

A. Excuse me, per thousand board feet.

MR. JOHNSON: Mr. Moody, could you show the next?

BY MR. JOHNSON:

Q. What is the cabinet grade that we see here?

A. The cabinet grade is a proprietary product that was basically developed in the – I would say the late '70s, early '80s. That was when I was in quality control at our Arlington sawmill.

The cabinet grade is the result of working with one of our customers at Oregon, a company called Diamond Cabinet. I believe they've been bought by Schrock since then. This goes back a long ways. I think they are owned by someone else.

But the cabinet grade is a product that we developed out of the number one shop. And the number one shop grade has both a cabinet grade and a custom shop grade in it. But working with Diamond Cabinet, they said, "Well, [Tr. 57] the number one shop is a great grade, but there are certain boards then that we just can't use."

So working with them at our mills, the quality control people were involved, head of quality control was involved, our sales people were involved, our mill personnel was involved, we developed the cabinet grade for cabinet manufacturers.

MR. JOHNSON: Mr. Moody, thank you.

Your Honor, if I may approach and show a larger exhibit.

THE COURT: You may.

BY MR. JOHNSON:

Q. Could you step down, Mr. Bosley.

A. (The witness complies.)

Q. Mr. Bosley, I am going to show you Exhibit No. 1384. What is this exhibit, Mr. Bosley?

A. This exhibit is an enlargement of an advertisement that we had in the Hardwood magazine. I cannot remember exactly what year it was, but we have the cover of the Hardwood magazine every March. The Hardwood magazine is a magazine that's distributed throughout the United States and I think in foreign countries as well, intended for buyers of hardwood lumber.

Q. Who is this gentleman?

A. This gentlemen here, his name Jesse Arenus (ph).

* * *

[Tr. 77] Q. What percentage, as you understand it, of alder – what percentage does alder represent of the production of the [Tr. 78] Pacific Northwest?

A. It's approximately 95 percent.

Q. Now, you talked earlier a little bit about proprietary grading systems?

A. Correct.

Q. Real briefly, how many grades does alder have?

A. Alder has within – let's say four-quarter, that's probably where we have most of our grades, I would consider alder having 30 grades.

Q. And how many grades would – let's take an example, cherry from the East Coast. Typically, how many grades would cherry have?

A. For us?

Q. Yes.

A. I don't know exactly. We may have 10 grades.

Q. Is it a fair summary that alder, in your experience, has more specific grades than any other hardwood species?

A. Well, no, I wouldn't say that, because I think some of our glacial products out of Wisconsin have a lot of grades as well because it's further color sorted. For example, we have a red oak superior wheat color, we have a red oak superior tan color, we have a red oak superior pink color, and red oak superior off color, basically.

Then we have the same thing with cabinet grade, we have the same thing with custom shop grade. We have a frame [Tr. 79] grade, so those grades add up as well. I don't know

exactly how many there are. They might be maybe a little bit less than alder, but there's quite a few of them.

Q. Are you aware, since you've been on senior management since 1997 that Weyerhaeuser carefully tracks its market share of alder lumber?

A. I'm not on senior management.

Q. Are you aware that Weyerhaeuser carefully tracks its market share of alder lumber?

A. I am not sure what you mean by "carefully tracks."

Q. Let me, sir –

MR. KELLEY: If the witness could please be handed the jury notebook, please.

THE COURT: That's it right there.

THE WITNESS: This? Okay.

BY MR. KELLEY:

Q. Excuse me, Mr. Bosley. If you would look, please, at Exhibit 409. Have you ever seen that document before?

A. Yes, I have.

Q. Is this a document that you typically at meetings throughout the year see documents similar to this at Weyerhaeuser?

A. No, I would not.

Q. Okay. Is this the only such document you've ever seen that identifies the market share of the various hardwoods?

[Tr. 80] A. There may have been other ones I've seen.

Q. You see on Exhibit 409, Weyerhaeuser estimates its share of the alder finish market at 75 percent?

A. Yes, I do.

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* * *

[Tr. 87] together.

Q. Now, you say industry grade. Where did this industry grade come from?

A. From the National Hardwood Lumber Association who promulgated the grades for hardwood lumber species of all types.

Q. So how did these industry grades that you referred to, how did they compare or relate to the proprietary grading system that you and Northwest Hardwoods developed?

A. Well, the first thing we found on the industry grades is that they had not been designed for the end user's needs. And so when we got into evaluating what the real needs of the end users were we found that there was a lot more value to them if we sorted the grades into our own what we call proprietary grades, where they were much more specifically designed to certain types of end-user applications.

Q. Now, what about other techniques or other improvements in the milling process, in the sawmilling process or the drying standards? What did you and Northwest Hardwoods do there with respect to this development of alder lumber?

A. Well, part of our strategy was to, first of all, create this improved value in the marketplace. But then, secondly, to increase the yield out of the logs in our mills through state-of-the-art technology, we developed a new thin kerf rotary sawing system.

[Tr. 88] It was the first one used which was followed by an abrasive planer instead of a knife planer that surfaced the lumber. And then a number of other things over the years, all of which were designed to either or both increase the value to the end users or improve the yield of the logs through the sawmill.

Q. And when you refer to end users, what types of businesses are you referring to?

A. Well, they are primarily kitchen cabinet manufacturers and furniture manufacturers of all types. There were others that made all kinds of different things out of the hardwoods; but those, plus the grocery pallet manufacturers, were the largest.

Q. Now, how were these end users, in particular the furniture manufacturers and the kitchen cabinet manufacturers, how were they receiving what you've been developing in terms of alder lumber of Northwest Hardwoods?

A. Extremely well.

Q. Tell us about it.

A. Over the years that we were in the business, most of the time that we were sold, which meant that most of the time we had more demand for what we were producing than we could supply.

Q. So what did that prompt Northwest Hardwoods to do?

A. Well, to expand. Most of the years that we were in the [Tr. 89] business, we were out looking for more capacity to get more product for people who wanted to buy it from us.

Q. Mr. Curtis, earlier in this trial, a man named Jim Harrison, part of the family who owned Diamond Wood down in Eugene testified. Did you have discussions with any members of his family as part of your negotiations to purchase Diamond Wood?

A. Yes.

Q. What, if anything, did you tell the members of the Harrison family, the owners of Diamond Wood, about Northwest Hardwoods' intentions or plans in Oregon? Describe that for us, please.

A. Well, we had plans to gain capacity or the resource which included Oregon. And we had be looking at available mills down there to have – to acquire capacity, so when they offered their mills to us, we were very interested.

Q. You say "they offered their mills" to you. Who actually initiated that sales transaction? Was it your company or was it Diamond Wood?

A. No, it was Diamond Wood. It was the Harrison family who actually contacted a senior vice president at Weyerhaeuser's headquarters because they were offering a package, most of which involved a number of tracts of timber most of which were softwood. The hardwood mills were part of the package that they offered.

* * *

[Tr. 93] Q. You just mentioned log now. That's a good time then to transition to talk about logs. With respect to the issue of log procurement or going out and getting logs for your milling operations, what were the companies, Northwest Hardwoods' objectives in buying logs and buying alder logs in particular? What were you trying to do?

A. Well, again, our raw material strategy stemmed from – we were trying to create the value in the marketplace, so we wanted the best quality of logs we could get for starters. And, secondly, we were trying to extract the maximum value of the logs going through the mills. And basically all we did besides that was try to make the best buy that we could on the logs at each mill based on the value of those logs.

Q. How did you know, how does one know how many logs to buy for a mill? What's the strategy there?

A. Well, each of our mills put together an annual plan and a quarterly plan. And we sold our lumber – in order to give more consistency to the end users, we sold our lumber in advance on a quarterly basis, so we were selling 90 days out in advance of our production at the start of each quarter.

So we had a pretty good idea of how many saw logs especially that we would need.

Q. Mr. Curtis, while you were at Northwest Hardwoods, while you were president at Northwest Hardwoods, did that company at any time have a strategy to raise log prices or

* * *

[Tr. 96] time. So you try to go into that time of the year with your maximum log inventory, and you try to balance it out so that you don't run out through the winter months.

Q. There has been some testimony in this trial about Northwest Hardwoods' log inventory. Do you have any particular recollections of seeing any log inventory issues while you were at Northwest Hardwoods?

A. Not on the saw logs, although there were a couple of times we did run out of saw logs at one or more of the mills.

Q. Let me stop there then for a minute. What happens when you run out of saw logs?

A. Well, your whole system falls apart. You have a problem with your reliability of the customers, because you don't produce the lumber that you expected. And obviously it creates havoc with your bottom line to lose money if you run out of logs.

Q. Okay. Now, I interrupted you. You were saying with respect to log inventory issues, not with respect to saw logs, but that was when I interrupted you. Please continue.

A. Now, with respect to pulp logs, we had especially a situation in the Longview area where Weyerhaeuser also owned a very large pulp mill in Longview right near our sawmill. And they were big users of hardwood chips to make pulp and paper out of, but they were not as good at forecasting their [Tr. 97] usage as we were.

And we had two or three years where during the summer months we bought pulp wood real heavily to cover their expected needs the rest of the year. And between that time and the winter months, two or three times, their markets fell or curtailed their use of it, and we were stuck with big pulp log inventories two or three times, as I recall.

Q. Do you remember what years they were?

A. It think '89 and '93. Those were the ones that I remember most.

Q. Okay. I take it then that those were pulp logs that were purchased by the Northwest Hardwoods mill in Longview. Where would they have been stored, those pulp logs, before they're made into chips?

A. Well, we stored some of them in a log yard at the mill. We stored a lot of them in log rafts in the Columbia River, because alder will last longer if you store it in water than if you put it out on land. And then Weyerhaeuser had another yard about a mile away from our mill that we used on one occasion to store pulp logs.

Q. And then after those pulp logs would have been turned into chips by the Longview Northwest Hardwoods mill, they would be shipped over to the other Weyerhaeuser mill, the pulp mill in Longview?

[Tr. 98] A. Yes. They went from our mill into the pulp mill to be converted into pulp and paper.

Q. And approximately what's the difference, if you know, between Northwest Hardwoods' sawmill in Longview and the Weyerhaeuser pulp and paper mill in Longview that bought these hardwood chips, approximately?

A. About two miles.

Q. Turning to another area, Mr. Curtis, a man named Cliff Chulos testified earlier in this trial. Do you know Cliff Chulos?

Do you know Cliff Chulos?

A. Yes.

Q. Tell us generally who he is and how you know him.

A. Cliff was hired by Dave McCall who was our vice president of sales and marketing and worked for us in our Portland sales office for a number of years and was one of our better salespeople that we had.

In 1987, when we moved our headquarters of Northwest Hardwoods up to Federal Way where the Weyerhaeuser headquarters are located, we asked Mr. Chulos to be the manager of the Portland sales office, which he was.

Q. Now, Mr. Curtis, Mr. Chulos, in this trial, testified and made certain statements that he attributed to you about using log prices to try to get log pricers higher to hurt the competition. Did you ever make any such statements?

[Tr. 99] A. Absolutely not.

Q. Tell us what happened with Mr. Chulos and his position. What happened in the last couple years that he was employed by Northwest Hardwoods?

A. I can't remember the exact timing, but I think it was around 1990 that Mr. Chulos had a severe heart problem. I was notified that he was in Portland and had open heart surgery, and was going to be away from work for an extended period of time.

After he was released by his doctor to return to work, his doctor informed me that he had had a septuple heart bypass surgery. And I talked to the doctor about what limitations he should have, the doctor recommended that I not put him back into a high stress type job like he'd been in prior to his heart problems.

Q. What did you do?

A. Well, we were relocating all of our export sales staff to our headquarters in Federal Way. And I needed a good manager for that part of our business because it was growing real rapidly, so I offered Cliff a job as manager of the export sales group, which I thought he would really like because he really enjoyed the export sales program. And I felt that it would probably be somewhat less stressful than running the sales office in Portland.

Q. Did he remain in that position very long?

* * *

[Tr. 100] Q. Do you, Mr. Curtis, have an opinion regarding the [Tr. 101] character of Cliff Chulos for honesty and truthfulness?

A. Yes.

Q. What is your opinion, sir?

A. I would say that he is not very honest.

* * *

[Tr. 102] Towards the time that I was retiring, the softwood prices here in the Northwest started to come back down, mainly for the Douglas fir and the hemlock.

Q. Has there also been decreased logging of the Douglas fir and the hemlock and conifers generally?

A. Yes. There were couple of things that impacted that. One that's in the newspapers a lot was about the curtailment of logging on the federal property, on Forest Service and BLM land. But there was probably a bigger curtailment of future harvest by the riparian zones.

Q. What does that mean? Spell that out for us, please.

A. The riparian zone is the area on both sides of a stream. And if you are out in the woods or you fly over the forest, you'll notice that a lot of hardwoods grow following

the streams through the timberlands. So as the riparian buffers were set aside to protect the streams, the best that I can figure out, there's probably a third of the future potential harvest of alder was going to be lost.

Q. What did you observe then, say, the years from early 1990s until your retirement in the later part of the decade, what did you observe in terms of the availability and prices of alder timber ultimately turning into alder logs? What did you see?

A. That there was just a trend line was moving up.

Q. Why?

[Tr. 103] A. Well, again, part of it was because in the past most of the years I was in the business, we had a big surplus of alder in the Northwest. But with the curtailment going on of the harvest, and then a lot of the land had already been converted to conifer production, you could see the supply diminishing.

At the same time, the demand for alder was increasing, especially to the point where a lot of the veneer mills jumped into the business to start producing alder veneer. And a veneer mill buys the highest grade logs there are and they pay a lot of money for them, more than a sawmill can afford to, so those were all things pushing the prices upward.

Q. And that's what you've observed up until the period of your retirement?

A. Yes.

Q. Now, would you talk to us very briefly about the period of your transition from basically your retirement and your last year or two with Weyerhaeuser and Northwest Hardwoods. To whom was the managerial responsibility that you held? How was that transitioned and to whom?

A. Well, during 1997, I spent a lot of time turning over the operating management of Northwest Hardwoods to Rob

Taylor. And my role became more of one of advisory to him, reviewing strategies with him, but I was no longer what [Tr. 104] you would call a hands-on type manager of the business.

Q. Were you doing other activities for the Weyerhaeuser at the time?

A. Yes. In 1996, I became involved in the development of their pruned pine resource in the southern part of the United States, and development of their pine and hardwood resources in Australia, New Zealand and Uruguay.

Q. And then you ultimately retired when?

A. I retired in June of 1998.

MR. SIMON: Thank you, sir. Nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HAGLUND:

Q. Mr. Curtis, in that '97-'98 time frame you were still reviewing all of the strategies in place at Northwest Hardwoods, isn't that so?

A. Pretty much so, yes.

Q. Now, isn't it a fair statement, Mr. Curtis, that between 1980 and 1995, the end of that year, that Weyerhaeuser went from zero to 75 percent of the alder industry in the Pacific Northwest?

A. Yeah. Other than Weyerhaeuser before they acquired us in some years had been in and out of the alder business before. At the time they acquired us, I can't remember if they were still producing anything in their own mills, but it wouldn't have amounted to much, so I am pretty sure that they started around zero.

[Tr. 105] I don't know about the 75 percent. We never knew for sure how much other mills were producing. There were always some small mills that would jump in and produce when the demand was real hot. And there was always some multi-species mills, that if they felt they could make more money sawing alder than cedar or fir or hemlock, they would jump in and saw alder, so I never did know what percent.

Q. Wasn't your own estimate 70 percent by the time you acquired Goodyear-Nelson and Diamond in 1995?

A. Yeah, I would say I would guess about 70 percent.

Q. Okay. Now, isn't it true, Mr. Curtis, that in 1983, you planned with Juel Sheldon to open a log merchandising yard and both drive up and deprive – I am sorry, I am misstating this.

Isn't it true that in 1983, you worked with and directed Juel Sheldon to open a log yard in the Longview area and both drive up log costs and deprive Ross-Simmons of those?

A. No, that is absolutely not the case.

Q. Isn't it true, sir, that you on at least one occasion stated to senior staff members, quote, "There's only room for one alder sawmill in Longview"?

A. No.

[Tr. 106] Q. Isn't it true that you tried to buy Ross-Simmons in 1983?

A. We looked at it twice and I can't remember if the year was '83. It could have been.

Q. You thought you had a deal at one point, didn't you, with the Ross family?

A. We never did get into a definitive agreement.

Q. Well, isn't it true that John Simmons and Marie Simmons protested the proposed sale on antitrust grounds?

A. I think they did. I don't have first-hand knowledge of that.

Q. And isn't it true that within two years after the ownership of Ross-Simmons being consolidated in John and Marie Simmons that you convinced Weyerhaeuser Company to allow a conversion of the old Exeter mill that had been acquired from Stan Rose in Longview just down the street and convert it to a hardwood mill?

A. No. Weyerhaeuser came to me, I think it was in 1985, and told me that they were going to discontinue production of old-growth hemlock studs at that mill, and the mill was going to be shut down permanently and they were going to let all the employees go. And they asked me if I thought they could successfully convert it into a hardwood mill and operate as one. I said, "Yes," and we transferred it, and started it up as a hardwood mill.

[Tr. 107] Q. Isn't it true that you at one point tried to buy Cascade Hardwoods?

A. Yes.

Q. Isn't it true that you repeatedly directed Heinz Hohendorf, your Director of Operations, to use the log market to hurt competition?

A. Absolutely not.

Q. Isn't it true that a saw log can turn into a pulp log?

A. Yes.

Q. In fact, in your opinion, isn't it true that in the summer months alder log inventories can be compared to piling up lettuce in terms of their propensity for spoilage?

A. Yes, but let me clarify one question. You can't actually turn a saw log into a pulp log, but if you let it stain badly enough, it's not going to make good lumber.

Q. Isn't it true under the log grading system that's in place at your company or at Northwest Hardwoods that a log can stain enough to go into a very – into the low value category that's not much more valuable than a pulp log?

A. Yes. If it comes in in that shape. We would downgrade it when we bought it as a pulp log.

Q. Now, isn't it true sometime in the late '80s that you counseled your senior managers to stop talking about alder as a distinct industry and instead refer to it as a small part of a total U.S. hardwood market?

* * *

[Tr. 112] A. Yes.

Q. Now, in November of 2000, do you recall the chairman and CEO of Weyerhaeuser announced a hostile takeover attempt on Willamette Industries?

MR. SIMON: Beyond the scope of the direct, Your Honor.

THE COURT: Objection will be overruled. It's cross-examination and it relates to the subject.

You may answer.

THE WITNESS: Tell me the question again.

BY MR. HAGLUND:

Q. Do you recall that in November of 2000, the president, CEO and Chairman Steve Rogel announced that private negotiations with Willamette Industries' executives had not resulted in a deal and that Weyerhaeuser was commencing a hostile takeover attempt of the publicly-held company?

A. Yes.

Q. And I would like to put on the screen, Mr. Curtis, a map that's been marked as Exhibit 14. Do you recognize that part of Oregon and Washington. Longview is here.

A. Yes.

Q. Centralia is there?

A. Yes.

Q. Do you recognize all of the dark red as Weyerhaeuser tree farms in Southwest Washington?

[Tr. 113] A. Yes, it looks like it.

Q. And let me represent to you that the pink here is Willamette Industries' holdings in Northwest Oregon. You're familiar with their large tree farm in that part of Oregon, are you not?

A. I am not real familiar with it. Mainly, I know what I read about it.

Q. I want to ask you this question: I want you to assume that there has been some testimony in this case that in the last quarter of 2000, and the first quarter of 2001, that a turnaround business consulting firm on behalf of Ross-Simmons is attempting to market and sell Ross-Simmons as a company at its Longview location.

Wouldn't you agree, Mr. Curtis, that Mr. Rogel's announced hostile takeover attempt of Willamette Industries with its large holdings in Northwest Washington in combination with the holdings that Weyerhaeuser already had in Washington state, would have a chilling effect on the ability of that turnaround team to sell Ross-Simmons to a buyer?

A. Well, I don't know that I'd agree with that without knowing some more facts about it, but in the earlier years, as I recall, especially on the southern part of what I'm looking at as the orange here, that that material didn't really flow up into the Longview area. It was not a [Tr. 114] well-

developed area for alder logs down there. And I – as I recall, most of our logs and I suspect Ross-Simmons' logs came from much shorter distances than that area.

Q. Is it your testimony, sir, that Clatsop County where this land is located, referring to the Willamette that is in pink, not orange, that Clatsop County alder logs did not flow to your Longview mill as well as Ross-Simmons?

MR. SIMON: Objection, Your Honor, misstates the evidence. That's not Clatsop County.

THE COURT: Restate your question.

BY MR. HAGLUND:

Q. Is it your position, Mr. Curtis, that these Willamette lands in Clatsop and Columbia Counties in Northwest Washington, that your company as well as Ross-Simmons did not receive alder saw logs from that part of Oregon in the 1990s?

A. No, we did, but I was referring more to the southern part of that. That looks to me like it is getting down into Tillamook County.

Q. You're referring to this down here then? Can you see it on the screen?

A. Yeah, I see that. How about that other part?

Q. This is up by Astoria.

A. Okay. Out of Astoria, definitely, we had flow of logs coming from there.

[Tr. 115] Q. So if this is Astoria right there approximately, the little dot that I made.

A. The little dot, not the arrow?

Q. No. The arrow is further south.

A. Yeah, right. That's what I'm saying. About where your arrow is, you know, I wouldn't guess without knowing

for sure that those logs would tend to flow down to Garibaldi, but I don't know that for sure.

Q. You're familiar with log rafting, aren't you?

A. Yes.

Q. It's a pretty cheap way to move wood, isn't it?

A. Well, you know, since I've retired, I haven't seen any log rafts in the river anymore, so I don't know what happened to that business, but I don't.

Q. Let me ask this very simple question: You're aware, are you not, that in the 1990s, your Longview mill, which is closer than Garibaldi to at least the northern half of that Willamette Industries' land holding drew alder saw logs from Willamette in that upper northwest corner of the State of Oregon?

A. Yeah, we would have drawn some from there.

Q. And would you agree, Mr. Curtis, that a potential buyer of Ross-Simmons in the fourth quarter of 2000 or the first quarter of 2001, evaluating the resource supply situation, would have viewed the pending hostile takeover attempt of [Tr. 116] Willamette Industries as a potentially negative factor in looking at whether or not it made any sense to buy Ross-Simmons?

MR. SIMON: Your Honor, this is way beyond the scope of my direct. I object.

THE COURT: The objection will be overruled.

THE WITNESS: I have no idea what a potential buyer would do.

THE COURT: I am going to sustain the objection on the grounds it's argumentative.

MR. HAGLUND: I'll go on, Your Honor.

BY MR. HAGLUND:

Q. Isn't it true, Mr. Curtis, that Weyerhaeuser further enhanced its position in the alder industry with the June 1999 acquisition of the largest forest products company in Canada, MacMillan-Blodell?

A. This is after I retired. You know, I am not sure.

Q. Are you familiar with the fall 2000 acquisition of Coast Mountain Hardwoods, also in British Columbia?

A. Again, I heard about it.

THE COURT: I think this is argumentative.

MR. HAGLUND: Okay. All right. I'll move on.

BY MR. HAGLUND:

Q. Mr. Curtis, you said that you saw the – before you retired, you saw the alder supply decline. Isn't it true, [Tr. 117] sir, that between 1995 and the end of 2000, that the total amount of alder harvested in Oregon and Washington was basically flat for those five years. Are you familiar with that?

A. I don't know.

Q. You don't know. Riparian buffers, you refer to them as set-asides. Isn't it true, sir, that the forest practices regulations in Oregon and Washington allow considerable removal of alder within the riparian zones. You're familiar with that, aren't you?

A. Again, I really don't know. I mean, I know there's some that can come out and I have no idea how much. I know the numbers I was looking at in mid-'90s showed that there was going to be about a 35-percent decline in the hardwood harvest.

Q. But they really aren't set-asides, are they? Or you just don't know?

A. Yeah. I'm not sure what a set-aside is exactly.

Q. And isn't it true that your own company expected the impact, the regulatory impact, to really come in early – early in this decade of the 2000s, not in the '90s?

A. Well, yes. It was going to happen around the end of the century.

Q. Now, you also referred to a lot of veneer mills jumping in. Are you aware of any veneer mill, in Oregon or

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[Testimony of David McCullam]

* * *

[Tr. 128] not sure.

Q. Would Mr. Cliff Chulos attend those meetings?

A. He began to attend those – what era are we in?

Q. Late '80s, early '90s?

A. Oh, yeah, certainly. Cliff was very much a part of that in the late '80s, yeah.

Q. What was Mr. Cliff Chulos' job during in the late '80s and early '90s at Northwest Hardwoods?

A. Cliff assumed a growing role in the entire marketing of our products. Beginning in 1987, he began to grow into that to a greater capacity. And that growth, along with the growth of our products and our production, continued right into the early '90s. He was an integral part of the team.

Q. What types of topics were discussed at these meetings, areas?

A. We would talk about performance, which was the past performance of a month or a quarter. We would talk about the potential of markets, where we thought the markets were going for the next three, six, nine and twelve months.

We would talk about the source of raw material, where it was coming from, what challenges they could foresee in the near term. And we would talk about our facilities, were we having problems, were we having expansions, where were we going.

Q. Were there any discussions about log inventories?

[Tr. 129] A. There would be, yes.

Q. And what types of discussions would there be about log inventories?

A. The log inventory discussions at those meetings always talked about maintaining the proper balance of lumber or logs to be assured that we would keep the sawmills running, they wouldn't run out of logs. And that was a very delicate balance because the supply of logs was seasonal.

It could be get very limited during the wet months where you might get snow or you might get closures in the woods, so we had to build inventory to get through those. On the other hand, you didn't want to get too much inventory because if you got caught with warm weather, the logs would stain. And then it became our job to sell stained lumber, and that was not a pleasant task and it was not a profitable task.

Q. So from your perspective as a salesperson, what were your views on lumber stain?

A. On lumber stain?

Q. Yeah.

A. We didn't like it. It was – it was a substandard product that resulted because of the uniqueness of the alder log, but it was not something that you jumped with joy when you had it.

Q. Now, at these meetings, did Arnold Curtis ever express

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* * *

[Tr. 136] wood was being marketed.

Q. To whom did you report at Ross-Simmons?

A. Mel Kaiser.

Q. Who were Ross-Simmons' major suppliers when you were there?

A. For wood?

Q. For logs.

A. For the logs? Oh, there were big corporate accounts like Longview Fibre that – they provided a big chunk of the wood, Campbell Group and Champion International. And then there were various and sundry – we had some loggers that were – would bring in the wood off their jobs to the mill. And then there was just a gob of just small vendors selling anywhere from, you know, 5 to 50 loads.

Q. And did certain kinds of suppliers do timber sales and certain kinds of suppliers would call you?

A. Yeah. Yeah, for an example, Champion had everything by timber sale, and they would put the wood on the market, and you would come up, look at it. You would make a bid on the wood, looking at it standing, and I – that's where my forte was.

And Mel handled the big accounts with Longview Fibre and Campbell Group, and they would basically bring it into there – in from their woods operations, funneling it into the mill. And Steve Remmick had a lot of contacts with [Tr. 137] loggers, and he would go out and purchase wood from these loggers that he had known from his previous – previous experience.

Q. So you would go out and look at the logs, give the vendor a price, and then what would the vendor say usually?

A. Sometimes – it varied from vendor to vendor because some people had been doing business with Ross-Simmons for many years. You give them the price and they'd say, "Okay," and they'd start shipping the wood in. Others were, you know, marketing it and getting a bid from all the potential delivery points and just weighing up the prices and they make the selection then. Sometimes you'd get the wood; sometimes you don't.

Q. Would you ever raise your price in the face of a competitor's bid that was higher than yours?

A. Well, that didn't happen. I mean, it – it wasn't that common in the business that I did. If somebody you know and most – because usually you had one shot at it, you know, and you put your bid in, and if it wasn't high enough, they'd say, "Well, you're going to send this someplace else," and they didn't come back and try to bump the price up, you know. There may have been a couple of times that did occur, but it – but it wasn't common, to my experience.

Q. And is the only time you were buying hardwoods is when you worked for Ross-Simmons?

[Tr. 138] A. That's correct.

Q. So you never told someone you'd like the last look at a log?

A. At Ross-Simmons, you mean, like last offered to?

Q. Right, that's what I mean.

A. No, I didn't do that.

Q. When you were at Ross-Simmons, who were your major competitors for the purchase of alder logs?

A. Northwest Hardwoods and Cascade Hardwoods here in Chehalis.

Q. Did you view those as your main source of competition or –

A. Yeah. Cascade Hardwoods, primarily because they were able to utilize or pay higher prices for the pulp-type logs.

Q. Do you know why they were able to pay higher prices for the pulp logs?

A. They had just – they had some small logs that were able, they were able to get a board or two off of every butt on the pulp, and it just gave them that edge. Instead of making chips out of it, they got a board, which, you know, a grade board, so that it increased their return out of that log, and typically it made a $4 a ton difference.

Q. Did you ever have any trouble buying enough logs when you were at Ross-Simmons to keep the mill running?

A. Yes. Yeah, it was – I don't remember the exact time [Tr. 139] frames or as far as what month it was or anything, but when Ross-Simmons lost the ability to – they ran out of working capital, so they lost the ability to pay for logs – their logs in a timely manner.

And at that point, there were many vendors that just wouldn't risk sending their logs to Ross-Simmons, and there were sometimes weeks on end that the mill was only running partially or just – or completely shut down and waiting for the – enough logs to – excuse me – enough logs to enter the yard to run the mill for a while, and that would have – well, let's see. I left in September. That would have been probably July and August of 2000.

Q. Okay. And when did you first hear that Ross-Simmons was having trouble paying its suppliers?

A. Again, I'm not exactly sure, but the first – probably the first four months of 2000, you know, the – the – historically Ross-Simmons had always paid. If you delivered, you

know, during one week, you would be paid. I think it was the following week, you know, so you got weekly pay.

And we were told it was on a – I just remember it was on a Friday, they came in and said, "You have to cut off the suppliers. Just tell them not to deliver because we don't have enough money to pay them," and –

Q. Who told you that?

[Tr. 140] A. The managers. There was, well, John Simmons and there was a guy there that worked kind of on a – he was a consultant.

Q. Gordy Boyd?

A. No. It was a Gayle something, but I don't remember his last name. He was just kind of – he was kind of analyzing, you know, before they hired a CFO, he was kind of filling in that capacity.

Q. So they brought you in one day and told you to stop buying logs, or what happened?

A. They – yeah. They – that's essentially what they said. "You've got to call all of your vendors and tell them not to deliver any more, because we – we can't – we don't have enough money to pay for the logs we have gotten this week – next week, and it was from that point on that the payment for the logs was slow for all – essentially all vendors.

Q. Did you have anything to say in response to John Simmons when they told you this?

A. I told him that it was the kiss of death. If you don't pay your log bills, it's – it's the kiss of death for a mill.

Q. And after you had that conversation, did you go out and call your vendors?

A. Uh-huh. If I could find my calendar, I've got it [Tr. 141] marked "Black Friday."

Q. And did the vendors stop selling and delivering to Ross-Simmons?

A. Yeah. You know, they stopped deliveries, and then I – I think it was – it was a panic. They – they had never had that happen before, I don't believe. It's just – it's like a panic thing. So then afterwards they had a chance to regroup, and then we went out and started, you know, buying logs, you know, again, after that, but –

Q. Did you buy them from the same vendors?

A. Many of them were the same vendors, yes.

Q. And –

A. But we did lose some customers because of that. I mean, you know, some vendors just weren't willing to take the risk.

Q. Can you recall any other supplier that was lost as a result of the late payments?

A. Well, there was Evenson Logging, which is – operates out of Northwest Washington, a privately-held family-owned company. And Evenson, you know, they were a pretty good size vendor. They owned, I don't know, 20 or 30,000 acres of land right around Longview. So they were – that was one of Mel's accounts because he had known them for a lot of years, and they – they stopped deliveries.

You know, they – they were delivering quite a bit [Tr. 142] of wood and so, you know, they weren't getting paid, so they – they just stopped. No point in putting – taking that risk. They just, you know – and there were others that – in smaller vendors, that would ask, you know.

Q. Did you ever observe any problems in Ross-Simmons' mill operations?

A. Yes. As far as the mill itself, it was a – it was an old mill.

Q. And when you say "old," do you mean – what do you mean exactly?

A. Most of the equipment was – was, although it was good equipment, it wasn't updated. They didn't have a lot of the computerized saws and things like that. There were some computers in the mill. I'm not a mill man, but it was no high tech mill by any means.

Q. While you were at Ross-Simmons, did you observe any new equipment purchases or investments in technology?

A. The only – the only major one was the – the stacker.

Q. What's that?

A. Basically, it replaces the green chain. It – it sorts and stacks the lumber as it comes out of the mill.

Q. And do you recall when that was made – that purchase was made?

A. It would have been – well, when I left in September, it was just – they were working the bugs out of it. It was [Tr. 143] just coming on line.

Q. Did you think that was a beneficial improvement for the mill?

A. Yes.

Q. And you said that you left Ross-Simmons on September 8 of 2000?

A. Yes.

Q. Why did you leave?

A. They let me go. They were –

Q. Do you know why?

A. It was a lack of money.

Q. Did you ever observe any problems in the management of Ross-Simmons' mill?

A. Well, I saw – there were some – some things that – I don't think John Simmons really understood mills, and he was the manager when I was there. Gary Nelson had just resigned just previous to me coming on line, so there was John Simmons, and Gordy Boyd at Global Ventures was assisting in the management.

Q. And what makes you say that John Simmons didn't understand mills?

A. He was a – he was a scientist, a NASA scientist, for all of his career. And he came to manage this family mill, and there were just – some of the decisions that he made were ill advised.

[Tr. 144] Q. Do you recall any of those decisions?

A. Well, he did things. He liked to pit one crew against the other on production, which could be a good thing, but the outcome was that they high graded the logs out of yard to –

Q. What did you say? They what?

A. High graded.

Q. High graded, what does that mean?

A. It means they pulled all – pulled all the logs out of the mixed decks, and so that there – their shift would have more production.

Q. Oh, I see.

A. Because you get more production out of the nicer, bigger logs. And the other thing that I observed that was – that the cutting of the logs was not done in a – in a most – to maximize the dollar out of each log in many cases.

Q. What do you mean by that? How does one maximize the dollar out of a log versus how was Ross-Simmons doing it?

A. Well, in lumber markets, the thicker the board, the higher the price. And, you know, I felt that – and this was just my impression in observing what was going on, but they would cut a lot of four-quarter because it was easy to sell.

And I always felt that they should have been [Tr. 145] cutting the six and eight-quarter, and letting the narrower stuff come out as fall down rather than being the primary cut.

Q. Did you ever discuss those issues with anyone?

A. Yeah.

Q. At Ross-Simmons? Who did you –

A. Talked to John Simmons about it.

Q. And what would be his response? What was his response?

A. He don't think that he – he didn't want to believe that they were not doing the right thing with the logs, but, you know, I pointed out that, you know, I felt that the logs had been mismanufactured, and he didn't – he disagreed with me.

But in the – after having made a public comment, you know, about my allegation, if you will, that they had mismanufactured the logs, that he acknowledged after a couple weeks when he saw the output from the kiln that I was correct.

Q. Do you remember approximately when you had that discussion with John Simmons?

A. Probably June or July of 2000.

Q. Did you observe any other problems in Ross-Simmons' mill operations while you were there?

A. That's all that I can think of. I mean, being an older mill, there's a lot of maintenance, you know, and that was [Tr. 146] just – maintenance was – was a problem. You know, the – it increased the costs.

Q. And maintenance, you mean maintenance of the equipment?

A. Yes.

Q. There in the mill?

A. Yeah.

Q. In this lawsuit, there is allegations against Weyerhaeuser of anticompetitive conduct. Have – did you ever observe anything while you were at Ross-Simmons on the part of Weyerhaeuser that would be what you would call – what you would consider anticompetitive conduct?

A. No. During the time frame that I worked there, I didn't see anything.

Q. You started shortly after Gary Nelson had left?

A. Uh-huh.

Q. That was December of 1999?

A. '99, yes.

Q. So you were with the company approximately 9, 10 months?

A. Nine months.

Q. Nine months. Okay. And –

A. Well, yeah, 10 months.

Q. So throughout your time frame, was Global Ventures present in terms of helping?

A. Yes.

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[Volume 6-A (Apr. 15, 2003)]
[Testimony of David Princehouse]

* * *

[Tr. 5] middle of 2001. Would you tell us what is Cascade Hardwoods or who is that business?

A. Cascade Hardwoods was begun in 1991, or 1961. It was a processor of alder chips for the pulp and paper industry. In 1964, Cascade Hardwood leased a portable sawmill and began sawing alder lumber. Cascade Hardwood has grown over the years to become a major player in the alder hardwood business.

Q. As general manager throughout the 1990s, what were your responsibilities, Mr. Princehouse, at Cascade Hardwood?

A. My responsibilities were the management of the business, the entire business.

Q. Now, during the 1990s, while you were general manager of Cascade, did you consider, say, Weyerhaeuser's Northwest Hardwoods business to be one of your competitors?

A. They were the single most significant competitor that we competed with.

Q. Who were some of the other competitors in the 1990s? Who made alder lumber?

A. Ross-Simmons, Rose City, Morton Alder, Alexander Alder, Diamond in Eugene, Sedro Woolley and Northwest Hardwoods.

Q. Very good. That was about alder lumber. Can you tell me, Cascade Hardwoods makes finished alder lumber, correct?

A. Correct.

Q. Among other products?

* * *

[Tr. 7] or a dark finish. This is cherry that is here, and this is a lighter finish versus walnuts or darker woods. They decide they are going to have a light-colored product so then they go and take a look at what lumber is available. There is Europe beech. There is poplar, birch, cherry, linga, and then they decide they are going to select alder, hopefully, and then we sell them that product.

Q. And sometimes your customers select alder and sometimes they don't. Is that a fair statement?

A. Absolutely.

Q. When you talk about furniture products, are you including within furniture products cabinets?

A. Yes.

Q. Some people talk about some cabinet, some furniture. You are including cabinets?

A. You bet.

Q. I understand that Cascade Hardwoods has its own proprietary grading system. Is that right?

A. That's correct.

Q. Tell us about it and tell us its history and purpose?

A. When I went to Cascade in 1992, we graded our lumber on NHL grades, National Hardwood Lumber Association grades. Grading is really a sorting process. If you are to take a look at a beach, and if you take a look at all the rocks on the beach, you have got little rocks and big rocks, green [Tr. 8] rocks and purple rocks. If you sort all those up, you end up with different piles of rocks, big ones and little ones and different colors.

In lumber, you have got high-grade lumber, mid-grade lumber, specialty lumbers for different products. So you have sorts. When I went there, we had seven sorts. Those were adequate in 1992. But in 1995, we began our proprietary grading. The reason was is that the customers were demanding a finer sort.

Our proprietary grades differed from Northwest Hardwoods' proprietary grades in that our grades were based upon a 2-inch wide strip of clear lumber within a board. Northwest Hardwoods' grades were based on pieces of clear lumber within a board that resembled the NHL grade rules, which was a 3-inch wide by 6-foot long strip, 4-inch wide by a 4-foot long strip within a board.

Our proprietary grades were different than Northwest Hardwoods. The reason we did that is because we were focused on the panel manufacturing market, which ripped a board into thin strips, cut out the defect, and then laminated them into panels that were used in furniture or cabinets or shelves or that kind of stuff.

Q. When you retired from Cascade, how many different grades of alder lumber did Cascade have?

A. We had over 30.

[Tr. 9] Q. Did Cascade use those grades in helping to compete with other hardwoods?

A. Yes. By making the finer grades, what I say is the more specific sorts, we allowed the customer to not have to buy junk. In other words, they bought only the grade and the lumber product within that grade that they wanted. Under the old NHL grade rules, a customer would buy a unit of lumber and they may have had to waste 40 percent of that lumber because it had other grades in it that they weren't particularly looking for.

Today you have to have the specific grade that the customer is looking for almost within every board. And that's

why we went to the proprietary grades, much finer sorts, much more customer focused. It allowed the customer to have a higher yield.

Q. By the way, I take it – have you ever worked for Weyerhaeuser or Northwest Hardwoods, Mr. Princehouse?

A. Not to my knowledge.

Q. Okay. Thank you, sir. Now, you are familiar with the Washington Hardwoods Commission?

A. Yes, I am.

Q. What is the Washington Hardwoods Commission?

A. Washington Hardwood Commission was chartered by the State of Washington as a public commission in 1991. Its charter is to promote the planting, management and marketing [Tr. 10] of alder.

Q. Have you ever served on that commission?

A. Yes, I have.

Q. In what capacity and what time period?

A. I am the vice chairman of that commission today. I have been a commissioner since 1995.

Q. Now, in the mid-1995s, then, early to mid-1990s, did Cascade Hardwood, your company, receive or develop any information or beliefs about the future availability of harvestable alder timber in the Pacific Northwest?

MR. HAGLUND: Objection, Your Honor, calls for expert testimony.

MR. SIMON: Your Honor, I'm asking for fact testimony.

THE COURT: The objection will be overruled. You may answer.

THE WITNESS: I think you all remember the dramatic reduction in the federal timber harvest begun in 1992 – well, it actually begun in the mid-80s, but it really hit the Northwest in the early '90s. Les Aucoin, a congressman from this state, developed a bunch of grants that were aimed at mitigating the lack of the timber harvest.

One of those grants was a $400,000 grant that ended up with the U.S. Forest Service focused on hardwoods. [Tr. 11] The result of that was that the U.S. Forest Service, Washington State Department of Natural Resources, Washington Hardwood Commission, and several other cooperators developed a geographical information system based upon satellite, land satellite pictures of the state of Washington.

That total package, which was managed by the Washington Hardwood Commission, developed a picture of the state of Washington. That data focused on hardwoods. It developed a picture of all of the hardwood available in the state of Washington. That was about 20 billion board feet. It was right down to a 75-square foot section of the whole state. It identified the ownership, where it was located, and it identified the age classes that that hardwood was.

Then over that picture, there were various overlays that were put on. There were overlays. The reason – there were hydrographic overlays. There was land sliding overlays, parks, that kind of stuff. The reason that is important, each one of those overlays took a little bit of the available timber out of harvestability.

In other words, you are not going to harvest in a national park. You are not going to harvest in federal lands anymore. You are not going to harvest where there is riparian zones, around streams and that kind of stuff. The total reduction in the available harvest at that time was around 11 percent, which was significant, but it was not [Tr. 12] dramatic.

I presented that information to the Western Hardwood Association annual meeting in 1997. All of the major players – all of the players in the alder business had that data.

Q. By the way, was anyone from Ross-Simmons at that meeting?

A. Yes, there were. Marie Simmons was there. She was an owner of Ross-Simmons. Bill Nelson was there. Sonny Powell was there. Sonny Powell was the sales manager for Ross-Simmons.

Q. Sorry to interrupt you. Please continue.

A. What that data said was that the alder business was basically harvesting the mature volume. If you take a look at how alder has grown in the Northwest, it really started growing in massive quantities in the 1920s and '30s.

MR. HAGLUND: Your Honor, I am going to object. I think he is interpreting this data as an expert.

THE COURT: The objection will be sustained. I don't find it in the witness statement, either. Go ahead.

MR. SIMON: For the Court's information, it is on page 70 at the first and second paragraphs. I will move on to another area. I think we have covered this sufficiently. That's where it was, Your Honor.

* * *

[Tr. 13] BY MR. SIMON:

Q. Now, with the information that Cascade Hardwoods was receiving, as you described, did Cascade Hardwoods consider this information – can you tell us whether or not it considered this information important?

A. It was critical.

Q. Why?

A. To our business.

Q. Why?

A. Because it said the availability of alder logs was going to dramatically decrease beginning in 1997. There was a harvest in 1997 in the state of Washington of over 400 million board feet of hardwood, of which about 85 percent was alder, about 90 percent was alder. The GIS information said that in 50 years the harvest would be 188 million board feet with a steady decline.

MR. HAGLUND: Same objection, Your Honor.

THE COURT: Objection sustained.

BY MR. SIMON:

Q. Mr. Princehouse, given you have said this information was critical to the survival of Cascade Hardwoods, would you now relate to us what, if anything, Cascade Hardwoods did in response to this information?

A. Yes. We at Cascade Hardwood recognized that we had to extend our log supply and –

* * *

[Tr. 17] So we put in these computer controls, and it not only cost us money but slowed us down. So we ended up having to put in more kilns, too. What it did, it made a higher quality product for the customer, which allowed us to get a higher price.

Q. Thank you. We have been spending some time talking about the production of lumber. I would like to shift and talk about the sales of lumber as experienced by Cascade. Can you tell me, was there any experience that Cascade saw with respect to sales of its lumber products in 1997?

A. Yeah.

Q. What happened?

A. Well, up until August 27th of 1997, it was a seller's market. Our inventory at that date was around 800,000 board feet of finished product. We had customers lined up to take it away. It was the most marvelous experience anyone would ever want to have in business. August 27, 1997, the Thailand baht collapsed.

Q. What's a Thailand baht?

A. Their currency. Then the whole Pacific Rim quit buying alder lumber and our sales went from we could sell anything we wanted to we couldn't sell anything we made. Our inventory went from, as I said, 800,000 board feet to over 6 million board meet in three months. We could not sustain that, absolutely could not sustain that, so we curtailed [Tr. 18] production.

The way we curtailed production was to remove all overtime from the mill, remove all Saturdays, and we started buying a low-quality log and producing pallet because we could sell pallet.

Q. Is Cascade Hardwoods still in operation today?

A. Yes.

Q. Now, did the technology that you just told us about play any role in helping your company to withstand what happened in August of 1997?

MR. HAGLUND: Objection, calls for expert testimony.

THE COURT: Objection overruled.

BY MR. SIMON:

Q. You can answer.

A. The technology that we had put in increased our overrun significantly. Overrun – I'll give you an example. If our overrun is one and we are paying $400 for logs, the cost of the log and the lumber is $400. If our overrun is 1.5 and we are paying $600 –

MR. HAGLUND: Your Honor –

THE COURT: Mr. Princehouse, if you will answer his question directly first. Maybe it will save some time. We are in a little bit of a time crunch here. The question was: Did it play any part? And that's a simple answer.

* * *

[Tr. 20] when I retired. When the market collapsed in August of 1997, there was a dip, a slight dip in log costs, but it was not relative to what you would expect prior to that.

Q. Based on your experience and observations, why?

A. Because we had such good times from '92 to '97. We had invested in not only technology, but we had increased the consumption of logs. We built bigger mills. Cascade was one of those. Northwest was one of them. Virtually everybody was consuming more logs.

And the availability of logs was going down; the mill capacity was going up. And when the line crossed of available logs and mill capacity exceeding the demand for the availability of logs, now all of the profit went from the mills to the timber landowners.

So what happened is, log prices did not drop the way you would expect because the capacity was now larger than the available log supply.

Q. Why didn't the timber owners just sell the logs for lower prices?

A. I guess –

MR. HAGLUND: Objection, calls for speculation.

THE COURT: Sustained.

BY MR. SIMON:

Q. Based on your experience, what does it take to get lower prices from timber owners?

[Tr. 21] MR. HAGLUND: Objection. Outside the scope of his witness statement.

THE COURT: Objection will be sustained.

MR. SIMON: Your Honor, that's page 71, first full paragraph.

MR. HAGLUND: Alternatively it calls for expert testimony.

MR. SIMON: I was asking for his observations.

THE COURT: I don't find that. The first full paragraph you are talking about?

MR. SIMON: Starts with the words "The investments."

MR. HAGLUND: He is talking about the log market.

THE COURT: I think he has covered that already. The objection will be sustained.

BY MR. SIMON:

Q. Mr. Princehouse, let's turn to another area. That is, I understand on two different occasions you actually visited the Ross-Simmons mill in Longview. Is that right?

A. That's correct.

Q. What were the years of the two visits?

A. It was in late 1992 I visited as a courtesy. Juel Sheldon invited me down to tour the mill.

Q. Mr. Sheldon was still president of Ross-Simmons?

A. I'm not sure of the title. He was the head man.

[Tr. 22] Q. That was in 1992. I will come back and cover that with some more detail in a few moments. When was the second time you saw Ross-Simmons?

A. Shortly after they closed. I believe that was in 2001.

Q. Now, would you relate to us what you saw when you were there in 1992 and compare that to what you saw in 2001, please.

A. In 1992, I saw a mill that was in certain ways better than Cascade Hardwood. They had two things that I saw that were really better: The first one is they had a small log line, a V-drum chipper that made center cants and pallets and some furniture lumber which we didn't have. They were able to manufacture lumber out of small logs, much smaller logs, than Cascade could.

The second thing they had was very large log decks and barkers that allowed them to purchase the whole – all of the timber that grew on a piece of land so it became a much more preferred buyer of timber from a timber seller where with Cascade we could only buy sawlogs. Therefore, there was pulpwood that somebody would have to sell that to somebody else.

Q. That was 1992?

A. That's right.

Q. Things looked pretty good under Mr. Sheldon?

A. Yes, they did.

[Tr. 23] Q. What did you see when you came back in 2001? What did it compare?

A. I saw virtually the same mill. The first thing I saw when I walked in the door is that all the overhead wires were there. In the nine and a half years at Cascade we spent a lot of money –

MR. HAGLUND: Objection, beyond the scope of the witness statement.

THE COURT: Objection will be overruled.

THE WITNESS: Cascade spent a lot of capital putting our wiring underground. The reason we did that, every time

it rains on – not every time, but a lot of times when it rains on overhead wires, they short out. You shut the mill down. You have to get started again. We could not afford that downtime from a manufacturing standpoint.

The second thing I saw is that their V-drum/chipper/canter was still there and that technology was way gone. The overrun that you get from that kind of a machine –

MR. HAGLUND: Objection, Your Honor.

THE COURT: The objection will be sustained to his expert opinions. We will confine it to what he saw precisely.

MR. SIMON: Even under Rule 701, Your Honor?

THE COURT: Yes.

[Tr. 24] BY MR. SIMON:

Q. Mr. Princehouse, describe what you saw, without adding your own opinions to it, but in comparison to whether you saw improved technology or things like that.

A. I saw a curtain scanner that was not there in 1992. I saw a large lumber sorter –

Q. Any other improvements?

A. No, sir. I saw a large piece of mobile equipment. I think it was a Cat 988.

Q. When you described the curtain scanner, that was the same piece of equipment you were telling us about earlier when you were comparing a stereo scanner?

A. Exactly.

Q. I take it you didn't see a stereo scanner?

A. I did not.

Q. Let me move to another topic that would be an issue that comes up a little bit in this trial about whether one com-

petitor keeps an eye on what another competitor is doing. I would like to ask you about your experiences while at Cascade in the 1990s. Generally did Cascade try to keep abreast of what the other alder and hardwood mills in the area were doing?

A. Yes.

Q. Tell us what you did.

A. We did it in log buying and log inventories. Our log

* * *

[Tr. 26] temperatures over 65 degrees for a period of time. It is microbe that makes the wood bluish. It occurs in warm weather six weeks after a tree has felled. In cold weather it does not occur at all.

Q. I take it that it is not a good thing to have staining on your logs?

A. No, it is not. Again, if you take a look at this paneling in this room, it is very uniform. If there is staining in it, it changes the color. It is not desirable for fine furniture or cabinet manufacturing. A customer will not buy it for that product. So a stained product can only – the majority of stain product is used in a painted grade and has much lower value. Therefore, it competes with a much lower valued lumber.

Q. While you were general manager of Cascade, did you have to balance the risk of trying to avoid staining on your logs with making sure you had enough logs to provide wood to the mill?

A. Yes, we did.

Q. Tell us how you dealt with that balance at Cascade Hardwoods.

A. Well, we took a risk. The way the log flows, there is a large log availability in the summertime. So we would build log inventories from, say, June until October 15th. We

would go in June from a log inventory to maybe 400,000 [Tr. 27] board feet to a log inventory on October 15 to maybe 5 million board feet. We would slowly build our log inventory during that period of time.

Q. Sawlogs?

A. Sawlogs, that's correct. If in September 15 to October 15 we experienced a time where it got hot, we would end up staining our log decks and we have lost a lot of money. But it was a risk we had to take. We traded off a risk of staining versus the risk of running out of logs in February and March.

Q. Now, based upon your observations when you were at Cascade Hardwoods, can you tell us whether or not you ever observed log staining issues at Northwest Hardwoods – when you were at Cascade, did you ever observe log staining issues at Northwest Hardwoods' log yards that were greater, less than, or about the same as about what everybody was experiencing?

A. The same.

Q. Then the final area I would like to ask you about, Mr. Princehouse, based on your observations when you were at Cascade Hardwoods, did you have any observations about Ross-Simmons' log buying practices?

A. Ross-Simmons, as I stated to begin with, had the manufacturing capabilities in the early '90s of buying the whole range of logs –

* * *

[Tr. 30] Q. Now, didn't you tell them – didn't you tell them at some point that the biggest risk that Cascade Hardwoods faced in 1999 was lack of logs at a reasonable price?

A. I'm not sure that I told them that. I think the biggest risk that we faced in 1999 was our ability to sell what we could make in the lumber market.

Q. Okay. Now, proprietary grades. Ross-Simmons had proprietary grades years before your company, correct?

A. Yes, they did.

Q. And you didn't make the change until 1995?

A. That's correct.

Q. Essentially it is largely a replication of the Northwest Hardwoods system, isn't it?

A. Yes.

Q. And isn't it true, sir, that your company in terms of total production did not overtake Ross-Simmons until 1998?

A. I don't have the actual facts.

Q. Do you know that you certainly weren't – I have been provided that data. Is it a fair statement that you were in the 30s and 40s in the period of 1992 through 1996?

A. That's million board –

Q. Million board feet.

A. That's correct.

Q. If Ross-Simmons was in the 50s during a significant part of that period, they were well ahead of you in terms of [Tr. 31] actual total production, weren't they?

A. You bet. Yes.

Q. Isn't it true, sir, that you observed Northwest Hardwoods make their proprietary grade tighter in bad markets?

A. You bet.

Q. And they make them looser in good markets?

A. Yes, sir.

Q. Let's make sure the jury understands this. You observed Northwest Hardwoods take their 30-plus grade system

and when the markets are bad, they get tighter on the good stuff going into each grade?

A. Yes, sir.

Q. And when the market is good and there is lots of demand, lower grade lumber ends up in the grade. It is a looser system?

A. Yes, sir.

Q. Now, you don't know, based upon your visit in 2001, whether the wiring at Ross-Simmons –

A. 2002.

Q. – 2002 – whether the overhead wiring at Ross-Simmons resulted in breakdowns of the mill every time it rained in Longview, do you?

A. No, I don't.

Q. And you said early in your testimony that it looked

* * *

[Tr. 33] Q. Did you make efforts to derive how much higher the log costs needed to be to push those margins into the red?

MR. SIMON: Objection, Your Honor. That's argumentative. There are no facts about that –

THE COURT: Objection will be overruled. It is cross-examination.

THE WITNESS: Would you please restate the question.

BY MR. HAGLUND:

Q. In your monitoring of competitors at Cascade Hardwoods, family-owned independent company all these years, did you go so far as to try to calculate how much the log costs needed to go up in order to drive your competitors' margins as you calculated them into the red?

A. Well, first off, we did not calculate our competitors' margins.

Q. You did never did anything like that?

A. Secondly, the answer to your question is no.

Q. Thank you. Now, you were also asked about staining. You used some statistics that I want to make sure are clear. You related that the Cascade Hardwoods mill in the summer building up to the fall might have a log deck in the 400,000 board foot area and move all the way up to 5 million board feet.

A. That's correct.

[Tr. 34] Q. Now, let's take the later part of the '90s when your mill with some of its improvements had become No. 2 in the industry, say, '98 forward in terms of production behind Northwest Hardwoods. Wouldn't you agree, sir, that the total production of your mill at Chehalis is reasonably comparable to the total production at the Longview mill of Northwest Hardwoods?

A. Our production was 60 million board feet in 1998 – 1999.

Q. If we look at Longview in 2000 – in '96 it was 61. These are stipulated facts. In 2000 it was 55.3. In 2001 it was 55 million. In 1993 it was 67 million?

THE COURT: Is that a question or a speech?

MR. HAGLUND: I'll turn it into a question here, Your Honor. Thank you.

BY MR. HAGLUND:

Q. If the facts show, Mr. Princehouse, that Longview is in the 60 million board feet area, that would be comparable to what your mill was doing '98 on?

A. Well, we are over 70 now.

Q. Let's take '98, '99, 2000.

A. Yes, comparable. Yes.

Q. Now, can you imagine, sir, any reason why you would drive your log inventory up to 18 million board feet in the summer months?

[Tr. 35] A. No.

Q. You would have a serious stain problem if you did that, wouldn't you?

A. If I could keep my logs in the Columbia River, I would not have a stain problem. If I could keep it in raft form, I would not have a stain problem.

MR. SIMON: I object to this line of questioning. The only evidence about this number –

THE COURT: Objection will be overruled.

BY MR. HAGLUND:

Q. If the bulk of the volume is on land, you have got a serious problem?

A. Yes, sir.

Q. And it is true, isn't it, that sawlogs can become pulp logs if they stain?

A. Absolutely.

Q. Now, Mr. Princehouse, you were asked some questions about log supply. I want to make sure that your testimony is clear. Isn't it true, sir, that you testified that the projected impact from that 1996 study that you made a presentation on in 1997 showed an 11 percent impact associated with regulatory?

A. Yes.

Q. 11 percent?

A. That's correct.

* * *

[Tr. 37] Proceed.

BY MR. HAGLUND:

Q. Mr. Princehouse, do you see the 400 million board foot line here?

A. Yes, sir.

Q. Isn't it a fair statement from 1997 through 2000 that the level of timber harvest in alder in the Pacific Northwest was stable?

A. Well, no, it is not. What I was talking about was a harvest of around 420 million board feet in 1992. That's the green. That's the Washington portion. I'm not aware of what went on in Oregon at all.

Q. Okay. Let's just focus on the green part.

A. Okay.

Q. Doesn't it appear from 1997 through 2000 that the harvest in Washington state of alder was also stable?

A. Yes.

Q. And you said something that I wanted to follow up on. That was that during this time frame the mills are all consuming more logs?

A. That's correct.

Q. In fact, if this is what the harvest is, the amount of consumption is relatively stable, '97 through 2000, correct?

A. That's not correct. This green portion is sawlogs and pulpwood. What the mills did, again, through small log

* * *

[Tr. 39] A. Yes.

Q. Isn't it true, sir, that the actual consumption in totality of the Northwest Hardwoods mills stayed the same in terms of they actually produced the same or more lumber with the same volume of logs?

A. I can't speak for Northwest Hardwoods. I can speak for Cascade.

Q. Now, Mr. Princehouse, were you aware of very sizeable runup in lumber inventories at the Northwest Hardwoods mills in 1998, '99, 2000?

A. Yes, I was.

Q. Isn't it a fair statement that rather than curtail production like you did, they continued to build inventory to huge levels?

A. Yes.

Q. And isn't it true that that caused a negative impact on the market as you observed it?

A. Yes.

Q. Let me display what is marked as Exhibit 82.

Mr. Princehouse, this shows the lumber inventory levels of Northwest Hardwoods as a division from '88 through 2000. Do you see in this '98 time frame through 2000 their inventory levels rise to a peak of nearly 40 million board feet?

A. Yes.

* * *

[Vol. 6-A (Apr. 15, 2003)]
[Testimony of Heinz Hohendorf]

* * *

[Tr. 45] A. I drove about 40- to 50,000 miles a year on I-5 between the Canadian border and Coos Bay.

Q. When you joined in 1982 Northwest Hardwoods, who did you report to?

A. To Arnold Curtis.

Q. And did you report to Mr. Curtis throughout the time you were at Northwest Hardwoods?

A. I did all the time until I retired.

Q. Well, let's start with the operation side of your job. During the – first of all, what were your chief responsibilities in terms of overseeing the operations?

A. Okay. Beginning with the purchase of raw material, to make sure we had an adequate log supply for the mills and that the original, at the beginning, the two mills, Arlington and Centralia, they was somewhat distinctively different.

The Centralia mill had a very small log yard. We couldn't hold more than two weeks of production in logging inventory. The Arlington mill had a larger log yard and water storage in Everett. You could hold four to six weeks. But generally we didn't want to hold any logs longer than six weeks from cutting into conversion because the summer months, May to September, they would have a tendency to stain.

At that point you couldn't use them for furniture [Tr. 46] lumber any more. The value would go down to pallet grade or chips.

The second part was to visit the mills on a regular basis with my mill managers, tour the facilities, look at issues from safety to people management to machinery and equipment.

The third part was meetings, sometimes on a regular basis with the mill management, on a monthly basis to look at the numbers and log buyers, and on a more informal basis, lunch or breakfast meeting in between so they didn't have to travel too much.

Q. You mentioned overseeing capital expenditures, improvements made to the mills. During the 1990s, would you briefly tell the Court and the jury what types of improvements were made at Northwest Hardwoods mills.

MR. KELLEY: Your Honor, I believe this is cumulative of the testimony yesterday.

THE COURT: I will allow the answer briefly. Let's move through it quickly.

BY MR. JOHNSON:

Q. If you could just concentrate on 1990 to 1995.

Mr. Martin yesterday covered some of the improvements made at the Eugene mill starting in 1995.

A. We basically looked at extracting higher value of the existing log flow and raw materials. We tried from the [Tr. 47] smaller logs in particular to extract grade lumber. Some of the portions were chipped. So we installed a small log mill, which I referred to in Centralia and later on in Arlington. We added some production to it but more so we extracted more value out of the same log flow.

We put in a kerf sawing system in the mills. That means that the alder has a very crooked curvature, and it is not a very straight tree compared to softwoods. When you saw a segment that had a large curve, you run out of lumber on one end or the other. If you had a device to follow the curvature, that would increase our recovery of yield to value. So we installed such in Centralia, Arlington, Longview and Eugene. The base price of the machine was $350,000. So most projects were near a million dollars.

We also went with the people to a training program. We trained all our operators to be a rough mill grader, understanding basically what the value of a piece of lumber is, to make them aware that if we are somewhat affected the value of down grade, to maintain that. And if they came to classes and took a short exam, when they are qualified, and most did, we paid 25 cents an hour more for those who passed the exam.

Q. Mr. Hohendorf, you mentioned supervising the management of log inventories at Northwest Hardwoods as part of your job. Who would you work with to manage log inventories?

[Tr. 48] A. With the log buyers, because they are responsible for creating the log flow through the purchase activity.

Q. How would you go about working with those individuals to manage log inventories?

A. We had an annual plan, and we knew the consumption rat on a weekly basis for each mill. We knew the capacity of the log yards and we also looked out, as I explained before, for the seasons.

We didn't want to have large inventories during the summer months because these logs would be stained. They had to be timed with our suppliers to come in as fresh as possible. This was done on an informal lunch or breakfast meeting.

We had some statistics that showed us what our inventories were. I was aware of them because I visited all the mills at least once a week, walked through the log yard or drive through the log yard and had a pretty good idea of how large the inventory was.

You get a view of what you are looking at a pile of logs, how many board feet. You get a look at what the quality of the logs are and you are watching the mill deck. As you see these coming through, you watch the rotation that they were first in and first out.

Q. Mr. Hohendorf, there has been some testimony in this case about relatively higher levels of inventory at Longview [Tr. 49] in certain years in 1989 and I believe 1993. Would you explain to the Court and the jury what was happening during those time periods.

A. You would probably see in most of our mills beginning with October an increase with the inventory for the winter. What's happening here, during the summertime oftentimes logging was curtailed because of the weather. The loggers couldn't move out more than four or five days early in the morning and had to shut down by noon. Our flow would be low.

By September, October, logging would be heavier, the activity, and we would try to build some inventory for the winter months. When it came November, Thanksgiving through Christmas, logging in general slowed down, inclement weather would curtail logging or if you had frost in the road, trucks couldn't move. So we had to have for safety a little higher inventory.

The situation in Longview later was a little different. We were a large supplier of chips to our pulp mill internally. I believe in 1989 the pulp mill came to us. In order to guarantee a supply in the winter of chips, we had to store a significant amount, 20- or 30,000 bone dry tons on their pile, which took up a lot of space. Longview pulp mill had several products: Hemlock, fir, pine and alder. They are running out of space. They are also [Tr. 50] sometimes run into old chips, which ferment on the piles and give you poor paper quality.

So they said, could we maintain this inventory in some way of form of logs, and I said, yes, we can do that. We put these logs into the IP pond next to Longview mill.

Q. What is the IP pond?

A. It is right next to the Longview mill. It is an old log pond, International Paper old log mill from back in the '20s.

We put it in the pond. A, it had storage room there; and B, it would preserve for some sort of freshness so they wouldn't stain.

Q. Would these pulp logs at Longview be on the inventory books at the Longview mill?

A. They would be on the inventory books for Northwest Hardwoods. They were our logs.

Q. Could I ask that the witness be shown Exhibit 1456. Do you have the document?

A. Yes, I have the document. It is a letter addressed to Steve Stricker and signed by Davis Woods, our raw materials buyer at the time.

Q. Are you cc'd on the second page?

A. Arnold Curtis and I am cc'd.

Q. Who is Mr. Steve Stricker?

A. Steve Stricker was in charge of chip procurement for the Longview pulp mills, a Weyerhaeuser employee.

[Tr. 51] Q. Who is Mr. Davis Wood?

A. Davis Wood was the raw materials buyer in Longview at the time.

Q. Did you receive this letter in October of 1989?

A. Yes.

Q. And what was this letter referring to?

A. This referred back to the strategy we had. Instead of storing chips in the inventory on the Longview side, that we would hold the logs for them. At a weekly budget of 2,600 tons, chip up and supply the Longview pulp mill for this winter season. However, at the time, the Longview pulp mill, I think, ran into some market conditions and it did not run into that rate and slowed us down. They had not only us but other suppliers –

MR. KELLEY: Your Honor, other suppliers is beyond the scope of the question.

THE COURT: Sustained. Is there an objection to 1456?

MR. KELLEY: No, Your Honor.

THE COURT: 1456 will be received in evidence.

BY MR. JOHNSON:

Q. Mr. Hohendorf, in general, in that time period of late '80s, early '90s, how was the general flow of hardwood logs in lower Washington?

A. The flow was heavy; more than the general hardwood

* * *

[Tr. 59] before winter. We had targets of what we needed to wood the mills in a safe manner not to run out of wood.

Q. What about pricing? Did you ever direct your log buyers to raise the price of logs in order to raise the price of logs to competitors?

A. On no occasion did I do that.

Q. We have heard some testimony, Mr. Hohendorf, about monthly senior management meetings at Northwest Hardwoods. Were you a part of the senior management team?

A. Yes, I was.

Q. Explain what types of meetings were held in terms of the senior management.

A. We looked at the last month result. We looked at comparing the data to the plan. We talked in an overall view if it could be achieved, our profit targets, if we achieved our manufacturing cost targets. To my recollection, there was not that much time spent on raw material or cost of logs.

Q. Do you recall any discussions about the balance that you were talking about between having enough logs and not having too many logs?

A. The only issue was, in particular, having too many logs because of the danger of them staining and delivering an inadequate product to our market and losing value in that process.

* * *

[Tr. 64] we can recoup profits later when competition goes away?

A. I don't recall that.

Q. You don't recall that?

A. No.

Q. You are sure?

A. No, I don't recall that.

Q. Do you remember Mr. Curtis ever saying that to you?

A. No.

Q. Do you recall at any of these senior management meetings the issue coming up if, in fact, we continue to pay high log prices, competition will go away?

A. No. It was not our objective to pay high log prices.

Q. Do you remember Mr. Curtis ever saying that he was going to raise log prices and make Juel Sheldon's life miserable?

A. That would have to be before my time because Juel resigned within about eight months after I came to Northwest Hardwoods.

Q. Okay. The time between 1988 and 1992, stay in that time period with these questions, please, sir. Do you recall

that Juel Sheldon was manager and president of the Ross-Simmons Lumber Company?

A. Yes, I do recall that.

Q. Now, within the same time frame of those management meetings, do you recall Mr. Curtis saying he is going to

* * *

[Tr. 66] 1993?

THE COURT: Yes. Go ahead. He can ask the question if he wants.

THE WITNESS: What was your question again, please?

BY MR. KELLEY:

Q. An explanation in log inventories in the 1993 time frame.

A. If I read the graph correct, that inventory dropped down in January. This inventory is starting to be building apparently in the fourth quarter of '92.

Q. And would an inventory at the Longview mill, in all your years of experience there, approaching 18 million be excessive in your opinion?

A. This was in anticipation of the needs of pulp mill chips. This is a large portion of that is chip wood and not sawlogs. And we had a commitment. The Longview mill consumed about 140,000 tons of chips a year. On a weekly commitment of 2,600 to 3,000 tons, we had to build up for a significant amount of pulp. At the same time, I remember, '93 was a very good softwood market as well. We had a lot of come-along logging from the softwood activity; everybody in the industry had a lot of pulpwood delivered consequently with it.

Q. Did you maintain at Weyerhaeuser during this time frame [Tr. 67] inventories that would show sawlog versus pulplog?

A. We would have.

Q. Weyerhaeuser maintains those?

A. No, we did.

Q. Who did?

A. Northwest Hardwoods.

Q. And you maintained inventories on the pulplogs?

A. On the pulplogs.

Q. Your explanation, then, in terms of this apparent spike in the 1993 time frame relates mainly to the increase in pulplogs at the facility?

A. Correct.

Q. Now, Mr. Hohendorf, you mentioned earlier that one of your primary tasks while at Northwest Hardwoods was to obtain adequate supply obviously for your mills. Now, isn't it true, sir, in the mid '90s, prior to your retirement, you saw a decline in the alder resource coming, did you not?

A. We did see that coming.

Q. You personally did, correct?

A. So did most of the people in that industry.

Q. And you personally believed that that impact or decline in resource would be felt in either 2002 or 2005, in that time period, correct?

A. It is hard to tell. This impact would have to come on when the plantation wood would be logged that the industry

* * *

[Vol. 6-A (Apr. 15, 2003)] [Testimony of Steven Carter]

* * *

[Tr. 80] A. Again, there would be hundreds, especially for Eugene, but Garibaldi also.

Q. Now, are all of these log suppliers about the same size in terms of the company that is selling you the logs?

A. No, a broad range. You might get wood from, you know, a person that is clearing a home site and has one load of hardwood. Or you might get, you know, logs from a family-owned company that manages 40 acres or 100 acres, maybe somebody's retirement, up through the medium sized and larger corporations as well.

Q. Let's start with those. Could you give the Court and the jury some examples of some of these larger industrial landowners that supply logs?

A. Georgia-Pacific, for example, Hampton Industries, Boise-Cascade, Roseburg Forest Products, Stimpson, Simpson Timber Company, Weyerhaeuser Company, as an example.

Q. How about some of the median sized?

A. Probably less well known but Thompson Timber, A & E, Starker Forest, pretty well known, Mormel and Menasha (phonetic).

Q. How do you get these log suppliers to come back to you so that you can continue the relationship? How do you get them to come back?

A. We try to work closely with people when they move logs, try and be there, evaluate their log on value and be a

* * *

[Tr. 87] Q. So during 1996 and 1997 from which of those two tree farms was Northwest Hardwoods buying logs?

A. From each of them.

Q. And there has been – in 1998 and 1999 did Northwest Hardwoods have log contracts with Georgia-Pacific?

A. In 1998 and '99, yes.

Q. And to your knowledge, what was the duration of those log contracts?

A. They were one year contracts.

Q. Briefly could you explain your understanding of those contracts.

A. Yes. They were for the purchase of a portion of G-P's sawlogs produced from the Toledo tree farm in exchange for some conifer volume to be sold back to Georgia-Pacific.

Q. So the contracts did not concern the Coos Bay tree farm?

A. No.

Q. Did the contracts concern all of the logs coming off of the Toledo tree farm for Georgia-Pacific?

A. No. November of '98 I think it was 70 percent of the 8 inch or what was called the sawlog, and I believe that was it.

Q. Now, were you involved in any of the negotiations for either of those two log contracts?

A. Yeah. My role was to negotiate a price for that log [Tr. 88] monthly.

Q. But were you involved in the original negotiations of the actual agreements?

A. No.

Q. To your knowledge, who was that person?

A. Del Fisher.

Q. And to your knowledge, who was the person on the other side at Georgia-Pacific in the negotiations?

A. I don't know.

Q. Now, you were starting to relay your involvement in those contracts. What was your involvement?

A. I would negotiate the monthly price with Georgia-Pacific.

Q. So each month you would negotiate with Georgia-Pacific on the price for the logs?

A. Yes.

Q. And what would happen if you couldn't reach a price?

A. Then we would wouldn't receive any logs.

Q. Did that ever happen?

A. Yes.

Q. When do you recall that happening?

A. I recall one time that G-P informed me that they wouldn't sell us any wood, in fact, for a month because they wanted to use all of that hardwood volume for their pulp mill for a month.

[Tr. 89] Q. Now, with whom would you negotiate?

A. Larry Bray.

Q. And to your knowledge what was his job at Georgia-Pacific?

A. He had a job title similar to mine. We are not big on titles.

Q. Explain for the Court and the jury how those negotiations would come about. Where would you go and where would you sit down and talk?

A. We usually met in either Larry's office or mine, and we went and had a cup of coffee on what he needed for logs for the coming month and I had mine. Usually mine were lower than his, and we would reach usually an agreement somewhere between the two numbers that day.

Q. What evidence would you bring to him about what you thought the market price was for the logs?

A. Well, I'm buying wood at these levels; I think it should be at this particular level.

Q. From 1996 to 1999, what was the average – approximately what was the average intake into the Eugene sawmill from Georgia-Pacific in terms of the logs?

A. Probably about 10 percent of our usage.

Q. There has already been some testimony in this case about Northwest Hardwoods purchasing logs from Weyerhaeuser Timberlands. What is Weyerhaeuser Timberlands?

[Tr. 90] A. Weyerhaeuser Western Timberlands manages all functions associated, I understand, with the timberlands in Oregon and Washington.

Q. And do you purchase logs from – from 1996 to 2000, did you purchase logs from Weyerhaeuser Western Timberlands?

A. Yes.

Q. And how would those negotiations work in terms of the price?

A. We would meet monthly as well, but we would use a market comparative to set that price for the next month.

Q. Could you explain that a little bit. What do you mean by market comparison?

A. We would choose – agree on, oh, three to five major suppliers from the prior month to use as a comparative for

what their price is. Then we would largely use that for the Weyerhaeuser timberlands price.

Q. I want to turn now to a slightly different topic, Mr. Carter. I want to talk about during the period of 1996 to 1999, okay. Who were the other types of entities out in Oregon purchasing hardwood logs?

A. For the most part it would be used in, if not lumber production, in veneer production and pulp chips.

Q. Let's start with sawmills. What sawmills were purchasing logs in Oregon from 1996 to 1999?

A. We have Northwest Hardwoods and Rose City Lumber, [Tr. 91] Westwood Lumber, Morton Alder, as examples.

Q. What about veneer mills? What veneer mills are out there purchasing logs from 1996 to 1999?

A. HR Jones, LC Veneer, Roseburg Forest Products, Myrtle Point Forest Products, South Coast Forest Products come to mind.

Q. What about chipping facilities during that time frame, 1996 to 1999?

A. Yeah. Coastal Fibre, Pacific Fibre, Thompson Timber, Wood Recovery and Western Wood. Actually Coastal Fibre would have four different locations, or three anyway. Georgia-Pacific themselves.

Q. Now, in terms of the competition for those logs, how did Northwest Hardwoods compete with the chipping operations for logs?

A. Well, over time kind of historically, I guess you might say, the lumber mills kind of required a kind of larger diameter log. But what we have done work on is a lot of value extraction, research and investment and time that really helps us to compete and use and extract value from 6 inch

diameter logs, really, one of the larger – so today you see – at the end of the time you are talking about there, you see –

Q. I'm sorry. Go ahead.

A. Some of that wood that may have been in a chipping [Tr. 92] operation before.

Q. 1996 then, and again in 1999, how would the sawmills in Oregon compete with the veneer mills for logs?

A. We would use very similar logs.

Q. How similar?

A. Their mills, to my knowledge, would try and use a 7 inch to 9 inch or so diameter kind of log that they could chuck and put in their machine and rotary peel. We would use a lot of that volume as well.

Q. Now, recently in the last couple of years have any new hardwood sawmills begun purchasing logs in Oregon?

MR. HAGLUND: Objection. The requirement is through '01, Your Honor. He has asked the couple of years.

MR. JOHNSON: Excluding '02, sorry.

THE COURT: You may.

THE WITNESS: In the last few years, Cascade Hardwoods has made a stronger portion of it.

BY MR. JOHNSON:

Q. As a resource manager, do you have any supervisory responsibility?

A. Yes.

Q. What are those?

A. I supervise three log buyers.

Q. And what types of discussions do you have with those log buyers?

[Tr. 93] A. We will talk about log quality, inventories, flow, values, pricing.

Q. Do you ever give them any type of direction?

A. You bet.

Q. What type of direction do you give them?

A. They are kind of the experts. If their eyes are on the timber or on the logs, then they are kind of saying here is the value that I see, and we talk about, okay, here is a value that then, you know, is there perhaps for us. Might give them direction on we need to be sure that we are recovering, you know, this bid or the other one from time to time.

Q. Have you ever told any of the log buyers working in your offices, sawmills, to purchase more logs than you all needed in order to keep logs away from competitors?

A. No.

Q. Have you ever told the log buyers working in your offices and your sawmills to purchase logs at high prices in order to raise the costs to competitors?

A. Absolutely not.

Q. You said you worked for Mr. Hohendorf and you worked for Mr. Fisher. Did either of those individuals ever tell you that it was the strategy of Northwest Hardwoods to raise log prices to raise the log costs of competitors?

A. Absolutely not.

* * *

[Tr. 117] Q. So there was some tying in your experience in this contract of the pulpwood to the alder sawlogs?

MR. JOHNSON: Objection to the word "tying," Your Honor.

THE COURT: The witness can answer.

THE WITNESS: I don't know that.

BY MR. HAGLUND:

Q. You don't know that. Okay.

Now, let me ask you some questions about transfer pricing. Do you, as the resource manager, handle the negotiations with the Western Timberlands Division for the alder sawlogs that come from Weyerhaeuser tree farms in Oregon to the Eugene or Garibaldi mills?

A. Yes, I do that.

Q. And it is your representation that if we were to look at the underlying records in the boxes that relate to Eugene in this case that we would find that the price that is paid for the sawlogs coming from Weyerhaeuser Company lands are fairly close to the prices paid to third parties?

A. Yes. By species and grade, they would be close to those comparative contracts that I talked about earlier.

Q. And it is your understanding that that's how the transfer pricing system between the Timberlands Division of Weyerhaeuser and the Alder Division of Weyerhaeuser is supposed to work?

[Tr. 118] A. I'm sorry. I didn't hear that.

Q. Is it your understanding that setting the transfer price at fair market value as determined by third-party sales is how the transfer of price is supposed to be set between the Timberlands Division and your division of Northwest Hardwoods?

A. Usually you try and set an equitable – again, an equitable price by sort and species and diameter.

Q. Now, Mr. Carter, you changed words here on me. Equitable is a fairly vague notion. When you testified on direct, you talked about looking at what major suppliers were being paid. I want to be precise here. Isn't it a fair statement

that the way you understand the system is supposed to work, the prices that you pay to Willamette or to Hampton or to Roseburg Forest Products in a given quarter should be relatively close to the transfer price that you pay for company wood?

A. Yes.

Q. Okay. Now, Mr. Carter, you were involved, were you not, sir, in the process in 1999 under which Weyerhaeuser sought an exemption from Oregon regulations regarding the log export substitution rules?

A. Yes.

Q. And you were involved when the company first attempted to get a bill in the Oregon legislature, correct?

* * *

[Tr. 124] A. Yes.

Q. Mr. Miller, the government affairs person for Weyerhaeuser, was there?

A. I believe Mr. Miller was there.

Q. You heard – and Mr. Buck read the letter that is marked as Exhibit 446, a portion of which is displayed on the screen, into the record at that hearing, didn't he?

A. Yes, I believe this is the letter.

Q. You listened to him, didn't you?

A. Uh-huh. I did.

Q. I would like to call – well, I would like to call your attention to page 2 of Exhibit 446, in particular the third paragraph. Do you see there in the middle of the third paragraph, Mr. Carter, that the statistics that we saw in the earlier draft that was in June – this is a September 13 letter – have changed?

A. Yes. And I heard that when Mr. Buck read the letter.

Q. Now, you were involved in providing data in this whole process?

A. Uh-huh.

Q. You gave it to Mr. Fisher, correct?

A. Yes, I did.

Q. Did you get a chance to review the final draft of this letter?

A. No, I didn't.

[Tr. 125] Q. Now, when you heard Mr. Buck recite these statistics in a public hearing in Salem, you knew these were false, didn't you?

A. The 34 sounded high to me. The 50 percent, I believe, is okay. The 34 sounded high to me at the time, yes, it did.

Q. And you did nothing to correct it, did you?

A. No. I didn't say anything at the time.

Q. Didn't send a follow-up letter to the State?

A. I did not do that.

Q. Nobody from Weyerhaeuser did, did they?

A. I don't know that.

Q. And 34 percent is so high it is over 5 times high, Isn't it?

A. No, my work really should have supported about a 15 percent representation of what that volume would represent as far as available for future use for Eugene.

Q. Your data showed 15 percent?

A. Something close to that, I believe.

Q. Now, I'm not aware of a Weyerhaeuser exhibit that shows that. Have you been shown one in preparation to – you were the person referenced in a witness statement as coming to talk about this subject matter. Have you been provided any material to support your statement that there was 15 percent?

[Tr. 126] A. No, I haven't.

Q. I would ask – well, another couple of questions. Mr. Carter, isn't it true that in addition to the Georgia-Pacific contract that we have talked about that you, in this period of '96 through 2000, made it a regular practice to engage in trades with large forest landowners in Oregon where Weyerhaeuser tied a willingness to trade certain conifer logs to the buyers' willingness to pass back alder?

A. No, not at all.

Q. And it is your statement that you have no records reflecting that?

A. That's my statement.

MR. HAGLUND: I would ask that the clerk pull impeachment Exhibit No. 493.

THE CLERK: I have 490 to 492.

MR. HAGLUND: Your Honor, I have it specifically listed on the impeachment list that was submitted on February 14. It describes these four pages.

THE COURT: There are so many thousand of exhibits, I'm not surprised that we are having trouble finding one.

THE CLERK: Okay. They are in the back.

MR. JOHNSON: Your Honor, I object to the use of this document as impeachment. I don't think it is proper [Tr. 127] impeachment. This document was provided to Mr. Haglund in discovery.

THE COURT: That's not the relevant issue now. You may use it. You may proceed.

MR. HAGLUND: Has the witness been handed that exhibit?

THE WITNESS: Thank you.

BY MR. HAGLUND:

Q. Mr. Carter, your attorney is right. This was produced by Weyerhaeuser as part of the tens of thousands of pages of documents that we received. At the top it says: '97 and the letters "EUG" are at the end. Isn't this a document prepared in your log department in Eugene in 1997?

A. That could be. I have seen us take a shot at trying to estimate what our world looks around us and what log is flowing.

Q. And you have seen this document before, haven't you?

A. I'm not sure. I don't know that I would recognize this document.

Q. Your company has prepared documents like this in Eugene, hasn't it?

A. Yes.

MR. HAGLUND: Okay. We move the entry of 493.

THE COURT: Any objection?

MR. JOHNSON: Objection. The impeachment of this [Tr. 128] document has not been established.

THE COURT: Do you object to the authenticity? MR. JOHNSON: No, Your Honor.

THE COURT: It will be received. 493 is received.

(Exhibit 493 was received.)

BY MR. HAGLUND:

Q. Mr. Carter, we see this small type. Folks are going to have to bear with me. The very top we see: '97, Eugene. Right?

A. Yes.

Q. And we see a title, Market share in Western Oregon, do we not?

A. Yes.

Q. We see projected in million board feet on the left, correct?

A. Yeah.

Q. Above the supplier column.

A. Yes.

Q. Let me scroll down here and let me show you what it shows. Is it a fair statement that this lists suppliers in western Oregon according to your company's records in the log department that you managed?

A. Whenever I set down and tried to –

Q. Please answer yes or no, sir.

A. No, it is not.

[Tr. 129] THE COURT: He can explain. Restate the question. You can answer yes or no. If you can't answer yes or no, then you can explain. If you answer yes or no, then you can explain.

BY MR. HAGLUND:

Q. Isn't this document a listing of projected supply from the named suppliers on this list prepared in your log department sometime in 1996 projecting 1997?

A. Yes.

Q. If we look at the state lands, it is midway down the list, isn't it?

A. Yes.

Q. If we look at – there are two columns: One for Northwest purchase where you apparently believe you are going to buy the state sale or sales constituting 8 million board feet, correct?

A. Yes.

Q. And you think there will be another 4 million of state wood available at high bid?

A. That's correct.

Q. And 12 million board feet of total harvest is not 34 percent of your supply, is it?

A. No. 34 percent wouldn't be represented by that 12.

Q. Mr. Carter, this is western Oregon. This is the whole west side of Oregon, correct?

[Tr. 130] A. I believe so.

Q. So that part of this state includes both your Garibaldi and Eugene mills, correct?

A. Yes.

Q. Okay. Now, let's look at another column. That's the third column. This says: Available with trade.

A. Yes.

Q. And you list Georgia-Pacific, Roseburg Forest Products, Willamette Industries, Lone Rock Timber, Boise-Cascade, correct?

A. Yes.

Q. These are companies with which you will trade conifer volume and expect alder sawlogs back, correct?

A. No.

Q. Then what does this column say, sir?

A. Well, it is similar to a bid of a high bid – it is a hypothetical look at what might happen if circumstances change as far as high bid goes. As far as trade would usually refer to a hypothetical situation, once again, it is an exchange of similar type of product. We have never actually entered into a trade there.

Q. It is your testimony that your company has never had a trading arrangement with any of the people on this list?

A. I haven't – let me correct that. I haven't negotiated a trade with these people.

Q. Okay. So you haven't personally negotiated a trade, but isn't it true, Mr. Carter, that Weyerhaeuser has engaged in conifer trades in exchange for alder sawlogs in the state of Oregon in the period of '96 through '01?

A. I don't know that.

Q. You don't know that. You are the resource manager and you don't know that. Is that your testimony, sir?

A. That's right.

Q. Now, if we look at – it is a little hard to see it all, but I think it is visible if people pull up to their screens. This page also aggregates those categories, does it not, combines them, each column?

A. You mean the total harvest column?

Q. Yes.

A. Yes.

Q. And it also segregates these components of the sawlog market into percentages of that market, does it not?

A. You mean at the bottom?

Q. Yes.

A. Uh-huh.

Q. And would you agree with me, Mr. Carter, that the list of suppliers here on this list would be considered the industrial forest category of the mid-sized through large landowners who have alder on their lands in western Oregon?

A. From - plus miscellaneous.

[Tr. 132] Q. Well, I didn't ask about – well, I'm sorry. Plus the miscellaneous, I agree with that. But above the word "miscellaneous" we have a list of the major mid-size to large alder sawlog landowners in western Oregon, correct?

A. That's correct.

Q. And if we look at these columns, you are projecting that you are going to be able to, in the first column – let's focus on the first column. Doesn't this first column project that you are going to be able to go to these large landowners and negotiate deals without having to go to an open bidding situation?

A. No.

Q. Okay. Isn't the second column the one that talks about available at high bid?

A. That's what it says, yes.

Q. Isn't it true, sir, that Roseburg Forest Products is one of the largest private landowners in western Oregon, at least in the Roseburg/Eugene area?

A. Yes.

Q. And isn't it true, sir, that very small amounts of their volume go up for open bid, and for this period of '96 through '01 you just go down to their office and negotiate for it?

A. Actually, I don't know how much they might put up for bid. We do negotiate log prices with Roseburg Forest [Tr. 133] Products.

Q. And here, sir, aren't you projecting that you will negotiate for 9 million and there will be one that goes up for open bid with competition?

A. No, that's not what that means.

Q. Okay. Okay. Let's just go to the bottom here. 49 percent is in the Northwest purchase column, correct?

A. Yes.

Q. And 33 percent is in the available at high bid column?

A. Yes.

Q. 13 percent is in the available with trade column?

A. Yes.

Q. Now, Mr. Carter – if the witness could be handed Exhibit 14 up. I think it is in my stack here. It is actually 15 that I need.

You recognize that as a map of the state of Oregon, don't you?

A. Yes.

Q. Ah, here is mine. This is Exhibit 15. I take it, Mr. Carter, that you are quite familiar with the land ownership of your company in this state?

A. Yes.

Q. So you know right where the tree farms are in the Eugene area and west of Roseburg?

A. Yes.

[Tr. 134] Q. Let me represent to you that this data is as of August of 2000. Is it a fair statement that all the red on this map would be Weyerhaeuser tree farms?

A. It looks like it.

Q. And is it also a fair statement that the purple here is the Georgia-Pacific lands, largely in Lincoln County? That is the Toledo tree farm?

A. It looks like it.

Q. Is it also true, sir, that the blue represents state of Oregon public timber on state of Oregon forests?

A. Again, that looks accurate.

Q. Now, Weyerhaeuser started exporting sawlogs in 1999 from its Douglas fir tree farms, didn't it?

A. I don't know that.

Q. Weyerhaeuser ended up getting the exemption it sought in the process we described earlier, correct?

A. Yes, we did.

Q. I want you to assume that Weyerhaeuser started exporting. Okay. It sounds like you don't know that, but please assume it.

If your company had not gotten the exemption, Mr. Carter, the Clatsop and Tillamook Forests up here in Northwest Oregon would not – you would not have been able to buy any alder sawlogs from those forests, would you?

A. I believe so.

[Tr. 135] Q. Well, I'm not sure – I'm confused. It may be that we just miscommunicated. Had you not gotten the exemption and assumed your company was exporting softwood logs from the state of Oregon, you would have been precluded from buying any alder from the two state forests in Northwest Oregon, correct?

A. Correct.

Q. And the Garibaldi mill would not have had access to that volume, correct?

A. Correct.

Q. And isn't it true, sir, that the next closest competitor of Northwest Hardwoods for the alder sawlogs from the Clatsop and Tillamook state forests was Ross-Simmons in 1999 and 2000 until they closed their doors in 2001?

A. Ross-Simmons was one of the competitors.

Q. They were the closest competitor to the Clatsop and Tillamook, were they not?

A. HR Jones was pretty close.

Q. HR Jones was closed by the end of '01, wasn't it?

A. I don't know that. I don't remember.

Q. All right. Let's take Westwood Industries, Mr. Carter. You know where they are, don't you?

A. Yes.

Q. They are down by the Elliott State Forest near Coos Bay, correct?

[Tr. 136] A. Yes.

Q. Same question: If you hadn't got the exemption, Westwood would be able to draw alder sawlogs off of the Elliott state forest without competition from your Eugene mill, correct?

A. We would have been ineligible from purchasing logs from the Elliott State Forest.

Q. Now, I forgot to ask you: Did you participate in any communications to the Port of Garibaldi or to the Tillamook County Commission in soliciting their support for the exemption that was received from the log export substitution rules?

A. No, I don't recall any communication I had with those people.

Q. Did you see their testimony read into the record on September 13, 1999?

A. I don't recall that either.

Q. Do you recall seeing information where Weyerhaeuser was threatening to close the Garibaldi mill if it didn't get the exemption?

A. No, I don't recall that.

Q. You don't remember that? Okay.

MR. HAGLUND: No further questions.

* * *

[Tr. 142] FURTHER EXAMINATION

BY MR. JOHNSON:

Q. The work that you did in late 1996 and 1997, were you doing future projections of state timber harvest or sales?

A. Yes.

MR. JOHNSON: No further questions.

THE COURT: Well, you better look at the letter and verify that so we don't have any confusion about that.

FURTHER EXAMINATION

BY MR. HAGLUND:

Q. This is, again, Exhibit 446, page 2. This is dated September 23, 1999.

Let's look at the highlighted sentence here, Mr. Carter. Let's look at the first part of the paragraph. Doesn't it talk about the current rules to impair our parent company's ability to compete if we sell softwood logs. If we go export, we would be disqualified from buying hardwood logs produced in Oregon state forests. And, sir, doesn't this sentence say those logs are estimated? Isn't that a historic statement, not a future projection?

A. I don't know that.